Supreme Court, U.S.
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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1998

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ALEXANDER MICKLE, et al.,
Petitioners,

v.

MICHAEL MOORE, et al.,
Respondents.

"IN RE: LONG TERM ADMINISTRATIVE SEGREGATION OF INMATES DESIGNATED AS FIVE PERCENTERS"

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Does placing prisoners in restrictive segregation on the sole basis of their religious beliefs and their refusal to renounce those beliefs violate the First Amendment?

2. Does the "command of judicial deference" in Turner v. Safley, 482 U.S. 78 (1987), eliminate for prisoners the procedural protections of Federal Rule of Civil Procedure 56, namely the rule that courts should accept as true the evidence of the nonmoving party and draw all justifiable inferences in its favor?

## PARTIES TO THE PROCEEDING

### Petitioners

Alexander Mickle, Donnathian Grant, Ameed Stevenson, Shaleek Azeem, Antonio Roach, Fountain Wise Allah, Von Huggins, James Hughes, Lord Musa God Allah, Equality King Supreme Allah, Wayne Hemingway, Kironda Haynes, James Zimmerman, Prince Hughes, Milton Dozier, Gregory Moment, Clarence Carter, Raheem Malik Shabazz, Tejie White, Grover Lumpkin, Booker Williams, Wayne Samuels, Charvell Douglas, Kuinta Parker, Elijah Smith, Quinta Parker, Tony Addison, Maurice Jacques, Leroy Smalls, Edward Washington, Larry Nelson, Derrick Dunbar, Ralph Davis, Brittie Cooke, Leroy Brice, Jermaine Dillard, Lord Shameal Allah, James Harrington, Tyrone Mitchell, Albert Jones, David Cross, Maurice Edwards, and John Frazier.

### Respondents

Michael Moore, former Commissioner; William Catoe, former Deputy Director for Operations and current Commissioner; and Kenneth D. McKellar, Director of Security, South Carolina Department of Corrections, in their official and individual capacities.

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The opinion of the court of appeals, In Re: Long Term Administrative Segregation of Inmates Designated as Five Percenters, No. 98-7337 (App. at A-1), is reported at 174 F.3d 464 (4th Cir. 1999). Rehearing was denied on May 19, 1999. App. at A-15. The opinion of the district court, Mickle v. Moore, Civil Action No. 96-5555-2-23AJ (D.S.C. Dec. 3, 1997) (App. at A-17), was not published.

## JURISDICTION

The court of appeals entered its judgment on April 21, 1999. A timely petition for rehearing was denied on May 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which in pertinent part prohibits laws "respecting an establishment of religion, or prohibiting the free exercise thereof"; and the Fourteenth Amendment, which in pertinent part provides that no state shall "deprive any person of life, liberty or property, without due process of law."

## STATEMENT OF THE CASE

Petitioners are inmates in the custody of the South Carolina Department of Corrections ("SCDC") who have been indefinitely placed in segregation solely because they are members of the Five Percent Nation of Gods and Earths (also referred to as "Five Percenters"). The Five Percent Nation was founded in the 1960's

by Clarence 13X, a former member of the Nation of Islam. Concerned with the spiritual well-being of young people in society, Clarence 13X focused on reaching those who had been overlooked by the older Muslims. The Five Percent Nation is separate from the Nation of Islam but emphasizes related texts, including the Holy Qur'an. Individual members study spiritual lessons, pray, fast, and participate in group worship.[1]

The courts below have assumed, for purposes of summary judgment, that the Five Percent Nation of Gods and Earths is a religious group entitled to protection under the Free Exercise Clause of the First Amendment. (App. at A-7, A-20-21). Petitioners presented evidence below, including an expert affidavit and excerpts from religious texts, showing that the Five Percent Nation is in fact a religion, not a gang or other kind of criminal organization. It is undisputed that numerous members of the Five Percent Nation in the SCDC have never threatened prison security in any way. Prior to the implementation of the SCDC's policy, these inmates had excellent institutional records and low security levels. While the Five Percent Nation is predominantly African American, its lessons make clear that anyone, including whites, can become a member. Several of the inmates whom the SCDC has designated as Five Percenters have been white.

In June 1995 the SCDC designated the Five Percent Nation as a "security threat group." The SCDC initially segregated approximately 300 inmates whom it suspected were members of the Five Percent Nation, including many inmates with excellent institutional records, low security levels, and no involvement in any

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1. For a description of the origins and spiritual beliefs of the Five Percent Nation, see Patrick v. LeFevre, 745 F.2d 153, 155-56 (2nd Cir. 1984).

prison misconduct. Segregation requires that inmates remain in their cells 23 hours per day. Inmates in segregation are excluded from prison school and work programs and lose good-time credit as a result. While in segregation petitioners have suffered from emotional distress, severe depression requiring medication, and physical pain and suffering. SCDC policy recognizes that conditions in its segregation units may lead to "acute anxiety or other mental health problems" over time.

The SCDC considers inmates for release from segregation only if they renounce their affiliation with the Five Percent Nation. According to the SCDC's Security Threat Group Procedures, "[t]he inmate must demonstrate their [sic] renunciation of affiliation with the STG and document their renunciation on a Security Threat Group Renunciation Form," after which the Institutional Security Threat Group Committee interviews the inmate to determine whether release is appropriate based on his renunciation. Many inmates have refused to renounce their religious beliefs and have remained in segregation since this policy went into effect over four years ago.

Any group may be designated a "security threat" if it consists of three or more inmates, a common name, and has members who have committed unlawful acts relating to safety or security. Although this definition includes nearly every racial, ethnic, or religious group in the SCDC, the record in this case shows that the Five Percent Nation is the *only* group it has designated as a security threat.

The SCDC has maintained that its categorical segregation and renunciation policy is justified because some individuals it designated as Five Percenters were involved in institutional disturbances. Petitioners have disputed the accuracy of methods used by

the SCDC to identify prisoners as Five Percenters.[2] Further, in the June 16, 1995 memorandum implementing its policy, the SCDC interpreted a particular religious lesson as support for its conclusion that the Five Percent Nation promotes violence: "The second lesson implies that the Five Percenters need to kill four 'DEVILS.' 'DEVIL' in the Five Percenter terminology is the white man or any other person not belonging to the Five Percenter Nation." As petitioners showed below, however, members of the Five Percent Nation are not called upon to murder white people, but instead believe that they must purify themselves by figuratively killing the four "devils" of "lust, pride, longing for luxury and . . . bondage to logic." There is no evidence of any Five Percenter killing any white person in South Carolina. The particular religious text analyzed by the SCDC actually comes from a lesson of the Nation of

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2. For example, in the SCDC's report on a January 1995 incident at Lieber Correctional Institution, the investigator identifies the participating inmates as "admitted Five Percenters (Muslims who follow the teachings of Louis Farakon [sic])." This identification is incorrect: Minister Louis Farrakahn leads the Nation of Islam, not the Five Percenters. The SCDC also cites the January 1995 incident at Allendale Correctional Institution as grounds for its designation, but none of the five inmates involved are listed in either the SCDC's April 1995 or March 1997 lists of Five Percenter inmates. The SCDC cites the April 1995 riot at Broad River Correctional Institution, but again none of the inmates involved were designated as Five Percenters when the SCDC implemented its segregation policy two months later. In fact, there is only one, oblique reference to the Five Percent Nation in the SCDC's thirteen-page criminal investigative report about this riot. Moreover, the rioting inmates' expressed reasons for their conduct (the Director's removal of inmates' parole, personal clothes and religious haircuts) bear no relation to Five Percenter beliefs generally as they do not require religious haircuts or other grooming techniques.

Islam, which the SCDC recognizes as a valid religion, not a security threat group.

The SCDC has also justified its policy by citing unsubstantiated reports from other prison systems. However, to the extent these reports suggest that the Five Percent Nation is a gang, not a religion, they directly contradict the testimony of a key SCDC official in this case.[3]

Petitioners do not minimize the seriousness of misconduct in South Carolina prisons. The inmates involved were properly subject to institutional and criminal sanctions for their violent and unjustified behavior. However, none of the SCDC's incident reports support the conclusion that members of the Five Percent Nation in the SCDC are involved in any system-wide conspiracy, or that their beliefs inherently give rise to legitimate security concerns. Instead, these reports describe isolated instances of misconduct that

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3. A one-page "intelligence summary" from the Federal Bureau of Prisons (BOP) -- which itself does not segregate Five Percenter inmates -- stated that the Five Percent Nation has a "[w]ell organized criminal structure" that "operates behind a facade of cultural and religious rhetoric." By contrast, SCDC Security Threat Group Coordinator Robert Walker testified that he believed that Five Percenters in the SCDC do not have a hierarchy -- even though "most traditional prison gangs" do. The BOP report stated that the Five Percent Nation is "very heavily into drug trade," whereas Walker knew of no Five Percenter involvement in illegal drug dealing or literature advocating drug dealing. The BOP report stated that the "main operating areas" of the Five Percenters "are concentrated in Monmouth and Ocean counties, New Jersey," but did not mention South Carolina at all. While Walker did not know of any gang that does not punish members who try to leave without approval, he was unaware of any such retaliation practices among Five Percenters in the SCDC.

could have been committed by any random group of inmates, regardless of their religious affiliation. When the SCDC placed the approximately 300 inmates believed to be Five Percenters in administrative segregation in April 1995, only *five* of those individuals had been identified in the reports that the SCDC has used to justify its designation of the Five Percent Nation as a Security Threat Group.

Beginning in July 1995, approximately forty-nine inmates filed individual *pro se* civil rights actions challenging the SCDC's treatment of inmates designated as Five Percenters. On October 25, 1996, the district court ordered the various cases consolidated pursuant to Fed. R. Civ. P. 42(a), under the caption "In Re: Long Term Administrative Segregation of Inmates Designated As Five Percenters." Petitioners filed an *Amended Complaint* on December 31, 1996. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

On June 4, 1997, the SCDC filed a motion for summary judgment. Petitioners responded with a memorandum of law; a list of the disputed facts in the case; an expert declaration describing the history and beliefs of the Five Percent Nation; declarations describing petitioners' religious beliefs, their excellent prison records, and conditions in segregated custody; religious texts of the Five Percent Nation; excerpts from the deposition of the Security Threat Group Coordinator for the SCDC; and other relevant institutional records.

On December 3, 1997, the District Court awarded the SCDC summary judgment on petitioners' First Amendment challenge to their indefinite placement in isolated custody. It recognized petitioners' argument that only a few members of the Five Percent Nation have any record of involvement in incidents of

violence in SCDC facilities,[4] but held that the "operative inquiry" under Turner v. Safley, 482 U.S. 78 (1987), was "more than a matter of mere percentages," but whether SCDC officials, "given the full body of information regarding the Five Percenters that was available to them, could rationally conclude that segregating the entire group would advance the legitimate interests of institutional security." App. at A-22-23. The court recognized a factual dispute regarding whether the Five Percenters had a "philosophy of racial hostility," but concluded that this question was incidental to the question "whether accommodation of Plaintiffs' asserted rights would impact the smooth administration of the prison." Id. at A-25. The court did not find any "ready alternatives" to the SCDC's segregation policy, although it did not specifically discuss the possibility of making individualized determinations of dangerousness unrelated to the petitioners' religious beliefs. Id. at A-26.

Petitioners appealed the district court's summary judgment order. On April 21, 1999, the Fourth Circuit affirmed. It stated that "restrictions that would clearly violate the Constitution outside the prison setting may be rationally based within that setting." App. at A-7 n.4. Based on three incidents that occurred in early 1995, the court of appeals stated that it was "rational" for the SCDC to designate all members of the Five Percent Nation as security threats. Id. at A-9. Petitioners could still exercise their religion: "Even in high-security confinement the Five Percenters remain free to pray,

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4. The court noted that of the sixty-four inmates currently confined in high-security segregated custody at that time, the SCDC had documented the involvement of eleven in prison disturbances. App. at A-22 n.1. Eighteen inmates believed to be Five Percenters were involved in the five incidents that took place between August 1992 and April 1995, prior to the SCDC's placement of 300 suspected Five Percenters in segregation. Id.

fast, and study religious materials." Id. To require that inmates be classified on the basis of their predicted dangerousness, not their religious identity, would deprive SCDC officials "of the all-important option of prevention." Id. at A-10. The court refused to credit petitioners' evidence regarding their rejection of racism and violence and their limited involvement in the incidents cited by the SCDC because "to draw these inferences in the inmates' favor would turn *Turner*'s command of judicial deference on its head." Id. As for the SCDC's requirement that inmates renounce their religious beliefs and affiliation, the court concluded that "it is up to the SCDC to determine when an inmate is safe to return to the general population." Id. at A-11.

Petitioners' request for en banc rehearing was denied on May 19, 1999. App. at A-16.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER PLACING PRISONERS IN RESTRICTIVE SEGREGATION ON THE SOLE BASIS OF THEIR RELIGIOUS BELIEFS AND THEIR REFUSAL TO RENOUNCE THOSE BELIEFS VIOLATES THE FIRST AMENDMENT.

#### A. The proper standard of review for prison policies that classify prisoners based on their religious identity is a matter of conflict among this Court and the circuit courts.

Certiorari should be granted because the Fourth Circuit's decision affirming summary judgment for the SCDC conflicts with the First Amendment jurisprudence of this Court and other circuit courts. Unlike virtually all other policies affecting prisoners' First

Amendment rights, the SCDC's designation of the Five Percenters as an "security threat group" is not a facially neutral policy which incidentally impinges upon religious freedom. Instead, it is an explicit policy which uses religious belief as a generic proxy for potential danger. Policies which explicitly target religion have repeatedly been held to violate the "foremost" objective of the Free Exercise Clause: to protect "the right to believe and profess whatever religious doctrine one desires." Employment Division v. Smith, 494 U.S. 872, 877 (1990). A "law targeting religious beliefs as such is *never* permissible." Church of Lukumi Babalu Aye, Inc. v. City Of Hialeah, 508 U.S. 520, 533 (1993) (emphasis added) (citation omitted). See also Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (describing concept of "freedom to believe" as "absolute" under Free Exercise Clause). The "principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." Church of Lukumi, 508 U.S. at 523. See Larson v. Valente, 456 U.S. 228 (1982) (holding that statute treating some religious denominations more favorably than others violated Establishment Clause); McDaniel v. Paty, 435 U.S. 618 (1978) (striking down Tennessee statute that disqualified ministers or priests from holding certain public offices); Fowler v. Rhode Island, 345 U.S. 67 (1953) (holding that municipal ordinance was applied unconstitutionally when interpreted to prohibit preaching in public park by Jehovah's Witness but to permit preaching by Catholics and Protestants); Niemotko v. Maryland, 340 U.S. 268 (1951) (vacating disorderly conduct convictions for two Jehovah's Witnesses who held meeting in public park where other religious organizations had previously been allowed to meet).

In its opinion, the Fourth Circuit refused to apply these First Amendment cases, stating that "restrictions that would clearly violate the Constitution outside the prison context" may survive review within that setting. App. at A-7 n.4. The decision not to

apply strict scrutiny to a policy which explicitly targets a religion inside the prison context ignores this Court's decision in Cooper v. Pate, 378 U.S. 546 (1964) -- a case with facts strikingly similar to this one. The plaintiff Thomas Cooper was a "Black Muslim" prisoner in Illinois: i.e., a member of the Nation of Islam. Cooper claimed that Illinois prison officials placed him in segregation because of his religious beliefs and refused to allow him a copy of the Qur'an. The district court dismissed his complaint, and the Seventh Circuit affirmed, taking judicial notice of "certain social studies which show that the Black Muslim Movement, despite its pretext of a religious facade, is an organization that, outside of prison walls, has for its object the overthrow of the white race, and inside prison walls, has an impressive history of inciting riots and violence." Cooper v. Pate, 324 F.2d 165, 166 (7th Cir. 1963). The Seventh Circuit also referred to reports of violence at other prisons in the country, and remarked that "it is apparent that the Muslim beliefs in black supremacy and their reluctance to yield to any authority exercised by 'some one (who) does not believe in (their) God,' present a serious threat to the maintenance of order in a crowded prison environment." Id. at 167 (citation omitted).

This Court unanimously reversed, stating that it violates the First Amendment for prison officials to discriminate against an inmate "solely because of his religious beliefs." Cooper, 378 U.S. at 546. On remand, after observing that Black Muslims, including Cooper, had been involved in "violent occurrences," the Seventh Circuit stated:

> The problem should not be minimized. Defendants, however, have not tried the course of permitting worship services for this group under regulation. Such course is apparently followed at some institutions. Although Cooper and other Elijah Muhammad Muslims at Stateville have been

> serious disciplinary problems, *there are other prisoners of their faith who have not been.*
>
> The district court found that there are *less drastic and less sweeping means of achieving necessary control of such group services than categorically banning them.* In part that is a finding of fact, and in part a recognition that *discrimination in treatment of adherents of different faiths could be justified, if at all, only by the clearest and most palpable proof that the discriminatory practice is a necessity.* Proof which would be more than adequate support for administrative decision in most fields does not necessarily suffice when we are dealing with the constitutional guaranty of freedom of religion . . . .

Cooper v. Pate, 382 F.2d 518, 521 (7th Cir. 1967) (emphasis added). As for Cooper's confinement in the prison's segregation unit, the court found that this treatment was "for normal disciplinary reasons and not because of any religious beliefs he may hold." Id. at 523. Only because "Cooper's detention in segregation is not on account of his religion," the Seventh Circuit concluded, his constitutional rights were not violated. Id. at 524. See also Cruz v. Beto, 405 U.S. 319 (1972) (reversing dismissal of complaint alleging that Buddhist prisoners, unlike Protestant, Jewish, and Roman Catholic prisoners, were denied right to hold religious services).

Instead of following this Court's ruling in Cooper, the Fourth Circuit applied the test established in Turner v. Safley, 482 U.S. 78 (1987), and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). However, this case does not involve a neutral policy that incidentally "impinges on" religious freedom, see O'Lone, 482 U.S. at 349, but instead a policy that directly punishes the exercise of

particular religious beliefs and requires that those beliefs be renounced in order for the punishment to cease. See Church of Lukumi, 508 U.S. at 546 (applying "most rigorous of scrutiny" to "law burdening religious practice that is not neutral or not of general application"); Employment Division v. Smith, 494 U.S. at 877-78 (same). Although the standard of review for a facially non-neutral policy is disputed as between this Court and the Fourth Circuit, existing case law may not resolve this question, because until this Court invalidated the Religious Freedom Restoration Act, see City of Boerne v. Flores, 521 U.S. 507 (1997), courts generally applied the heightened standard of that Act in all prisoner religious freedom cases. Nevertheless, the logic of this Court's two-tiered First Amendment analysis is as compelling in the prison context as it is outside. Non-neutral regulation of religious belief is intolerable under any circumstance.

### B. The Fourth Circuit's application of Turner v. Safley conflicts with that of other circuit courts.

Even if Turner governs all prisoner religious freedom cases, the Fourth Circuit's application of this test directly conflicts with that of other circuits. Courts in other circuits have refused to allow prison officials to prohibit all religious exercise altogether. In Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986), an inmate challenged a ban on group religious activities as part of a lockdown at a penitentiary. In support of his motion for summary judgment, the warden submitted an affidavit reciting the events that precipitated the lockdown a few years earlier and noting that a task force convened to review the operation of the penitentiary recommended several changes to secure "a safer environment for both the inmate population and staff." Id. at 597. The Seventh Circuit reversed the grant of summary judgment to the warden, concluding that it was unable to determine, based on the record, whether the continuing

ban on group religious activities at the prison was reasonably adapted to achieving an important correctional goal:

> The interest in preserving order and authority in a prison is self-evident, and internal security is "central to all other correctional goals." Nonetheless, in the absence of evidentiary support, [the warden's] assertion that a total ban on all group religious services is and was reasonably necessitated by security considerations is conclusory, and hence, an insufficient basis for summary judgment.

Id. at 599 (citations omitted). See also Whitney v. Brown, 882 F.2d 1068, 1078 (6th Cir. 1989) (holding that prison policy eliminating Jewish inmates' travel to weekly Sabbath services and annual Passover seders was exaggerated response to security objectives). There is no precedent in any other court that supports the Fourth Circuit's summary finding that prison officials may suppress a religious group altogether, based only on the contested assertion of prison authorities that such segregation advances security interests.

The touchstone of the Turner test is neutrality. Courts must "inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." Turner, 482 U.S. at 90. The SCDC's policy is not neutral. The SCDC implemented its policy on the basis of a demonstrably false interpretation of a religious text -- construing a lesson to mean that Five Percenters must kill "the white man," rather than eliminate negative character traits such as lust and pride -- which, it argued, showed that Five Percenter beliefs themselves constitute a threat to prison security. The SCDC continues to segregate all adherents of this religion, regardless of each person's institutional record or predicted dangerousness. It conditions release from segregation on the inmate renouncing his

religious beliefs and affiliation. The SCDC has never explained how renunciation promotes the goal of prison security.[5]

The Fourth Circuit rejected petitioners' claim of non-neutrality (App. at A-10-11) by stating that a challenged policy must merely be related to an ostensibly neutral government objective, not that the policy must itself be neutral with respect to the content of particular religious belief. The court concluded that "the STG policy is not aimed at anyone's freedom of expression." App. at A-11. This conclusion, however, misunderstands this Court's holding in Turner which requires that a challenged policy not only be supported by an ostensibly neutral purpose, but also be neutral *in operation*. Separating the SCDC's security threat group policy from the explicitly religious classification it allows creates a false distinction between policy and practice, a distinction Turner manifestly rejects.

In addition to requiring that policies be neutral in both purpose and operation, this Court has also repeatedly scrutinized prison officials' offered justifications to ensure that their responses are not "exaggerated." Turner, 482 U.S. at 98. This Court has not

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5. Nothing less than a full renunciation of religious identify will suffice; merely renouncing violence or other kinds of misconduct is insufficient. While the Fourth Circuit acknowledged that "prison officials should not be in the practice of . . . proscribing . . . anyone's private religious beliefs," it concluded that the SCDC's renunciation requirement "does not suddenly render the policy irrational." App. at A-11. The SCDC can constitutionally "hinge" the determination of whether an inmate could return to general population "on the renunciation of affiliation with a violent -- albeit assertedly religious -- group." Id. This analysis ignores not only petitioners' evidence that the Five Percent Nation is not an inherently "violent" group, but also the undisputed evidence that most adherents subjected to the SCDC's policy have had no involvement in violence or other prison misconduct whatsoever.

allowed officials' asserted connections between means and ends to escape review altogether. In Turner itself the prison officials asserted the neutral objective of rehabilitation in support of a regulation prohibiting inmates from marrying. Nevertheless, this Court found that this objective was "suspect" and "lopsided" in that there was evidence of "excessive paternalism" and greater official scrutiny of marriages of female inmates. Id. at 98-99. Similarly, in Procunier v. Martinez, 416 U.S. 396 (1974), the Court struck down regulations that provided for censorship of letters expressing "inflammatory political, racial, religious or other views or beliefs." As the Court later observed in Thornburgh v. Abbott, 490 U.S. 401 (1989) -- the case relied upon by the Fourth Circuit below -- despite the prison officials' asserted security interest, these regulations were "decidedly not 'neutral' in the relevant sense" because they invited suppression of expression and the exercise of officials' "personal prejudices and opinions." Id. at 416 n.14. See also Church of Lukumi, 508 U.S. at 534-35 (stating that Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs," and finding that challenged law was not neutral because its drafters were concerned about only one religious group, the Santeria, and because law "in its real operation" targeted Santeria sacrifices).[6]

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6. Petitioners have not challenged the SCDC's security threat group policy in itself, but only its application against their religion. The policy allows for any group to be designated a "security threat" if it consists of three or more inmates, a common name, and members who have committed unlawful acts relating to safety or security. Almost any racial, ethnic, or religious group would fall under this description -- African Americans, Southern Baptists, Sunni Muslims, etc. -- as all these groups include some members who have committed qualifying "unlawful" acts. By the reasoning of the Fourth Circuit, the SCDC could lock down all Catholic prisoners and require them to renounce their faith, so long as it justified

(continued...)

With regard to the second Turner factor, the Fourth Circuit concluded that "other avenues remain available" for the Five Percenters to exercise their religion. App. at A-9 (citing Turner, 482 U.S. at 90). "Even in high-security confinement the Five Percenters remain free to pray, fast, and study religious materials." Id.[7] This "freedom," however, hardly justifies the persecution that places adherents in lockdown 23 hours per day in the first place. Moreover, the only way for petitioners to escape indefinite segregation is to renounce their religious beliefs altogether. It is precisely such a Hobson's choice between religious freedom and severely restrictive conditions of confinement that the second factor in Turner aims to guard against.[8] The Fourth Circuit's constricted

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6. (...continued)
its policy as an attempt to promote prison security.

7. In fact, when the SCDC implemented its policy in 1995, it prohibited inmates from possessing any literature relating to the beliefs of the Five Percent Nation of Gods and Earths. Petitioners have access to such literature now in segregation only as a result of the preliminary injunction entered by the District Court (App. at A-35-39) and a subsequent *Consent Order* making that injunction permanent.

8. Cf. Allen v. Coughlin, 64 F.3d 77, 80 (2d Cir. 1995) (holding that record did not establish as matter of law that proposed alternative means of exercising right were adequate); Whitney v. Brown, 882 F.2d 1068, 1077 (6th Cir. 1989) (holding that prohibition on movement to attend Sabbath services left Jewish prisoners with "nothing," in violation of second Turner factor); Monmouth County Correctional Inst. Inmates v. Lanzaro, 834 F.2d 326, 338 (3d Cir. 1987) (finding that no adequate alternatives existed with respect to prison's restrictions on non-therapeutic abortions), cert. denied, 486 U.S. 1006 (1988). See also Jolly v. Coughlin, 76 F.3d 468, 481 (2d Cir. 1996) ("Here, the defendants placed the plaintiff in the position of choosing to follow his religious beliefs or (continued...)

notion of what "alternative means of exercising the right" satisfy Turner raises serious questions that deserve review by this Court.

As for the third and fourth Turner factors, the Fourth Circuit ignored substantial issues of material fact as to whether the SCDC can carry out its asserted security objective in a manner that accommodates petitioners' Free Exercise rights. Petitioners have argued that the SCDC should determine their security level on the basis of "objective, behavior-oriented factors," just as it does with all other inmates. These determinations need not focus solely on an inmate's past conduct; they may consider a wide range of factors, including the behavior of others with whom that inmate associates. The Fourth Circuit concluded that individual assessments of dangerousness "would simply reimpose the regime that existed before the STG classification" (App. at A-10), but the evidence below shows that certain incidents cited by the SCDC in support of its policy could have been averted or minimized had the prison officials acted on clear warning signs of future misconduct.[9] Petitioners do not contest "the all-important option of prevention." App. at A-10. What the SCDC cannot do is condemn all members of the

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8. (...continued)
to improve his conditions of confinement; that choice is not meaningful, much less constitutional.").

9. For instance, while they were inmates at Lee Correctional Institution, SCDC officials recognized inmates Willie Gary and Sheldon Crawford -- not petitioners in this case -- as "troublemakers" and received information that "they were going to seize a female hostage." Certainly the SCDC could have segregated these inmates on the basis of such information, which is unrelated to (and indeed inconsistent with) any beliefs or practices of sincere Five Percenters. Instead, the SCDC transferred these inmates to Broad River Correctional Institution, where they subsequently participated in the hostage-taking riot of April 1995.

Five Percenter religion merely by citing the misdeeds of individual members, alleged or real.[10] Of the hundreds of inmates affected by the SCDC's policy, many -- including petitioners Alexander Mickle, Shaleek Azeem, Walker Jenkins, and Ameed Stevenson -- previously had excellent institutional records and low security levels. Their beliefs are the only reason for their placement in segregation.

The Fourth Circuit's extreme deference to SCDC officials, coupled with its unwillingness to credit evidence in petitioners' favor, see Section II, infra, resulted in a ruling that is unusually hostile to the exercise of religious beliefs. While petitioners' religion is by no means mainstream, it is particularly important for this Court to protect its exercise:

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his

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10. Cf. Abu-Jamal v. Price, 154 F.3d 128, 135 (3d Cir. 1998) (holding that ready alternatives to prison agency's application of rule against inmates carrying on business or profession to inmate's writing existed where agency "could simply apply its rule in a content neutral fashion"); Benjamin v. Coughlin, 905 F.2d 571 (2d Cir.) (finding reasonable alternative to cutting hair of Rastafarian inmates that met prison's purported security interests), cert. denied, 498 U.S. 951 (1990). See also Chicago v. Morales, ___ U.S. ___, No. 97-1121, 1999 WL 373152, at *6 (June 10, 1999) (holding as unconstitutionally vague ordinance prohibiting not only intimidating gang conduct, but also "a significant amount of additional activity").

> God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.

United States v. Ballard, 322 U.S. 78, 87 (1944). The Fourth Circuit's decision conflicts with this Court's First Amendment jurisprudence generally, its decision in Cooper v. Pate specifically, and numerous decisions of other circuit courts defining the scope of prisoners' religious freedom. This Court's review is greatly needed.

## II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS WHETHER THE COURT BELOW ERRED IN HOLDING THAT THE "COMMAND OF JUDICIAL DEFERENCE" IN TURNER v. SAFLEY, 482 U.S. 78 (1987), ELIMINATES FOR PRISONERS THE PROCEDURAL PROTECTIONS OF FEDERAL RULE OF CIVIL PROCEDURE 56, NAMELY THE RULE THAT COURTS SHOULD ACCEPT AS TRUE THE EVIDENCE OF THE NONMOVING PARTY AND DRAW ALL JUSTIFIABLE INFERENCES IN ITS FAVOR.

In affirming summary judgment for the SCDC, the Fourth Circuit refused to accept the evidence of petitioners, the nonmoving party, as true. It expressly ruled that this Court's decision in Turner v. Safley, 482 U.S. 78 (1987), prevented it from drawing inferences in prisoners' favor:

> [T]he inmates protest that they are not a racist group and that they do not promote violence. They dispute some incidents reported by the SCDC, con-

> tend that others involve only a few inmates, and suggest that these were isolated cases. But to draw these inferences in the inmates' favor would turn *Turner*'s command of judicial deference on its head. The question is not whether Moore's conclusion was indisputably correct, but whether his conclusion was rational and therefore entitled to deference. *See Jones*, 433 U.S. at 127-28. . . .

App. at A-10. The court of appeals completely disregarded the expert and other evidence presented by petitioners showing that the Five Percent Nation is not racist, is not inherently violent, and in no way promotes or fosters gang activity or other unlawful conduct. It ignored SCDC official testimony showing that Five Percenters lack the essential attributes of prison gangs, including a hierarchy, initiation and retaliation practices, and involvement in drug dealing. It ignored the fact that Alexander Mickle and other petitioners had exemplary prison records and low security levels prior to being locked down for their religion in April 1995. The Fourth Circuit's application of Turner and the rules on summary judgment conflicts with the decisions of this Court and other circuit courts.

It is axiomatic that in deciding or reviewing a motion for summary judgment, courts must accept as true the evidence of the nonmoving party and draw all justifiable inferences in its favor. See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456 (1992); Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1991); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-59 (1970). Courts must deny summary judgment when a genuine issue of material fact remains to be tried, or where the moving party is not entitled to a judgment as a matter of law.

There is no prisoner exception to Federal Rule of Civil Procedure 56. Even when applying the "reasonableness" standard of Turner v. Safley, courts must construe evidence and draw inferences favorably to the nonmoving party. The Fourth Circuit's statement that "*Turner*'s command of judicial deference" prohibits the drawing of inferences in petitioners' favor is completely unsupported by prior precedent and creates a conflict with the decisions of this Court and other circuit courts.[11]

Just last year, this Court rejected the D.C. Circuit's attempt to impose, absent an amendment to the applicable federal rules, a "clear and convincing burden of proof" for certain prisoner claims in summary judgment proceedings. This change, the Court found, "lacks any common law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983 -- to provide a remedy for the violation of federal rights." Crawford-El v. Britton, 523 U.S. 574, ___, 118 S. Ct. 1584, 1595 (1998). The Fourth Circuit's modification of Rule 56 and established summary judgment procedure raises the very same concerns.

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11. See, e.g., Freeman v. Arpaio, 125 F.3d 732, 736-37 (9th Cir. 1997) (reversing summary judgment for prison officials regarding alleged denial of Muslim inmates' access to Jumah services, notwithstanding officials' disputed assertion that services were canceled due to absence of hired Imam); Shimer v. Washington, 100 F.3d 506, 510 (7th Cir. 1996) (finding fact issues as to reasonableness of prohibition on correctional employees from writing to parole board on behalf of inmates); Allen v. Coughlin, 64 F.3d 77, 80-81 (2d Cir. 1995) (reversing summary judgment where fact issues existed as to constitutionality of prison prohibition against receiving newspaper clippings by mail); Hunafa v. Murphy, 907 F.2d 46, 47 (7th Cir. 1990) (finding fact issues as to danger posed by distribution of pork-free diets to Muslim inmates in disciplinary segregation).

The Fourth Circuit's baseless modification of the rules on summary judgment was compounded by its exceedingly deferential application of the test set forth in Turner and O'Lone. Throughout its decision, it framed its inquiry in terms of mere "rationality." See, e.g., App. at A-3 (describing designation of Five Percenters as security threat group as "a rational response"), A-7 (requiring only "minimally rational" relationship between challenged policy and governmental objective) (quoting Hines v. South Carolina Dep't of Corrections, 148 F.3d 353, 358 (4th Cir. 1998)). The court stated that by incorporating "the language of rational basis scrutiny," the Turner Court "chose the most deferential possible standard of review for cases presenting such issues of prison administration." App. at A-7-8.

Indeed, few prison policies would fail a standard of "minimal rationality." See Heller v. Doe, 509 U.S. 312, 319-21 (1993) (stating that rational basis scrutiny does not require evidentiary showing by government, gives "strong presumption of validity" to challenged classification, and allows for "imperfect fit between means and ends"). The touchstone of the Turner test, however, is not rationality, but *reasonableness*: a policy that impinges on inmates' constitutional rights is valid only if "it is reasonably related to legitimate penological interests." Turner, 482 U.S. at 89. This distinction is critical. The Turner "reasonableness standard," this Court has cautioned, is "not toothless." Thornburgh v. Abbott, 490 U.S. 401, 414 (1989). In Turner itself the Court struck down a regulation prohibiting inmates from marrying as "an exaggerated response" to security concerns. 482 U.S. at 98-99. The deference that Turner accords to prison officials does not relieve courts of their duty to ensure that those officials do not disregard constitutional mandates. "This is especially true in the First Amendment area, where prison officials may attempt to 'eliminate unflattering or unwelcome opinions [and] apply their own personal prejudices and opinions.'" Knecht v. Collins, 903 F. Supp. 1193, 1200 (S.D.

Ohio 1995) (citation omitted); see also Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990) ("[D]eference does not mean abdication."). Turner requires a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." Salaam v. Lockhart I, 856 F.2d 1120, 1122 (8th Cir. 1988) (citation omitted).

In effect, the Fourth Circuit's change to summary judgment rules and emphasis on "minimal rationality" convert Turner into a subjective inquiry. The court suggested as much by determining not whether the SCDC's decision to implement its Five Percenter policy was actually "correct," but only whether it was "rational and therefore entitled to deference." The district court made this subjective reformulation of Turner more explicit by, for instance, stating that the operative inquiry under its first prong was "*whether Defendants, given the full body of information regarding the Five Percenters that was available to them, could rationally conclude* that segregating the entire group would advance the legitimate interests of institutional security." App. at A-23 (emphasis added).[12]

Turner, however, sets forth an objective, not subjective, test. It differs in this respect from the standards this Court has established in the context of general challenges to prison conditions

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12. See also App. at A-25 (stating that with regard to third Turner prong, SCDC officials possessed "competent information" about certain inmates' involvement in violent incidents and "racially-biased philosophies," from which they "reasonably concluded" that segregation of all Five Percenters would improve prison security; they "intended" this segregation to alleviate their perceived security risk); id. at A-26 (looking to "the information on which Defendants based their actions" with regard to fourth Turner prong). The district court never evaluated the SCDC policy objectively, under all the facts in this case.

(where courts must determine whether officials are "deliberately indifferent," see Farmer v. Brennan, 511 U.S. 825, 834 (1994)), or official brutality (where courts must determine whether officials acted "maliciously and sadistically," see Hudson v. McMillian, 503 U.S. 1, 5-6 (1992)). Under Turner, the inquiry is not whether SCDC officials acted "rationally" in 1995 based on the incomplete and inaccurate information immediately before them, but whether there is a "valid, rational connection" *in fact* between their policy and their purported governmental objective. 482 U.S. at 89. Courts are obligated to make "an independent review of the evidence." Salaam v. Lockhart II, 905 F.2d 1168, 1171 (8th Cir. 1990), cert. denied, 498 U.S. 1026 (1991). See, e.g., Turner, 482 U.S. at 98-99 (making independent evaluation of logical connection between restrictions on marriage and prison officials' asserted governmental objectives and concluding that officials acted "on the basis of excessive paternalism"); Hunafa v. Murphy, 907 F.2d at 48 (rejecting reading of O'Lone that requires "only a determination that a rational basis for the regulation can be conjectured," as opposed to determination after evidentiary hearing of "proper balance" between prisoner's religious freedom and needs of penal system).[13]

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13. The case that the Fourth Circuit cites, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977), does not contradict this point. There this Court indicated that the informed beliefs of prison officials should be deferred to absent "a showing that these beliefs were unreasonable." Id. at 127-28. Jones, however, presumes that inmates may *make* such a showing in opposition, not that courts must invariably rule in officials' favor once they articulate a "rational" basis for a challenged policy. Both Turner and O'Lone were post-trial appeals, and this Court's analyses drew heavily from the factual evidence developed at trial. See O'Lone, 482 U.S. at 350-53; Turner, 482 U.S. at 91-93, 97-99.

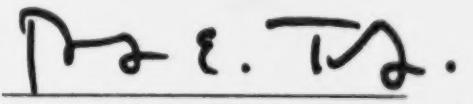
The need for an objective evaluation of the evidence, treated fairly under the rules for summary judgment, is especially important with respect to petitioners' claims for prospective relief. The SCDC's policy continues to this day: inmates like Alexander Mickle, who have no history of institutional misconduct or involvement in any criminal conspiracy, remain locked down 23 hours per day in segregation indefinitely. It is one thing for SCDC officials to escape damages liability on the ground that they had incomplete or inaccurate information when they implemented their policy in 1995. See, e.g., Anderson v. Creighton, 483 U.S. 635, 640 (1987) (recognizing qualified immunity where "contours" of legal right are not "sufficiently clear" to make unlawfulness of official's conduct "apparent"). It is far different to foreclose an injunctive remedy for an ongoing government policy not because it is "correct," but because it was "rationally" implemented four years ago.

The exceedingly deferential analysis below does exactly what this Court warned courts not to do: it immunizes prison officials from constitutional commands and renders Turner toothless. Unless this Court accepts review of this case, the decision of the Fourth Circuit will draw back the "iron curtain . . . between the Constitution and the prisons of this country," Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974), leaving even the most egregious violations of prisoners' religious freedom shielded from court review.

## CONCLUSION

For the foregoing reasons, petitioners urge this Court to grant their petition for certiorari.

Respectfully submitted,



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DATED: July ___, 1999

## APPENDIX


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| A-1 to A-14 | In Re: Long Term Administrative Segregation of Inmates Designated as Five Percenters, 174 F.3d 464 (4th Cir. 1999) |
| A-15 to A-16 | Denial of Petition for Rehearing (4th Cir. May 19, 1999) |
| A-17 to A-40 | Mickle v. Moore, Civil Action No. 96-5555-2-23AJ (D.S.C. Dec. 3, 1997) (unpublished decision) |

**PUBLISHED**

# UNITED STATES COURT OF APPEALS

## FOR THE FOURTH CIRCUIT

In Re: LONG TERM ADMINISTRATIVE SEGREGATION OF INMATES DESIGNATED AS FIVE PERCENTERS.

ALEXANDER MICKLE, DONNATHIAN GRANT, AMEED STEVENSON, SHALEEK AZEEM, ANTONIO ROACH, FOUNTAIN WISE ALLAH, VON HUGGINS, JAMES HUGHES, LORD MUSA GOD ALLAH, EQUALITY KING SUPREME ALLAH, WAYNE HEMINGWAY, KIRONDA HAYNES, JAMES ZIMMERMAN, PRINCE HUGHES, MILTON DOZIER, GREGORY MOMENT, CLARENCE CARTER, RAHEEM MALIK SHABAZZ, TEJIE WHITE, GROVER LUMPKIN, BOOKER WILLIAMS, WAYNE SAMUELS, CHARVELL DOUGLAS, ELIJAH SMITH, QUINTA PARKER, TONY ADDISON, MAURICE JACQUES, LEROY SMALLS, EDWARD WASHINGTON, LARRY NELSON, DERRICK DUNBAR, RALPH DAVIS, BRITTIE COOKE, LEROY BRICE, JERMAINE DILLARD, LORD SHAMEAL ALLAH, JAMES HARRINGTON, TYRONE MITCHELL, ALBERT JONES, DAVID CROSS, MAURICE EDWARDS, JOHN FRAZIER,

*Plaintiffs-Appellants,*

v.

No. 98-7337

MICHAEL MOORE, Commissioner; WILLIAM CATOE, Deputy Director for Operations, South Carolina Department of Corrections; KENNETH D. MCKELLAR, Director of Security, South Carolina Department of Corrections in their official and individual capacities,

*Defendants-Appellees,*

and

SCDC,

*Defendant.*

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
Patrick Michael Duffy, District Judge.
(CA-96-5555-2-23AJ)

Argued: March 2, 1999

Decided: April 21, 1999

Before WILKINSON, Chief Judge, KING, Circuit Judge, and LEE, United States District Judge for the Eastern District of Virginia, sitting by designation.

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Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge King and Judge Lee joined.

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## COUNSEL

**ARGUED:** Robert Earl Toone, Jr., SOUTHERN CENTER FOR HUMAN RIGHTS, Atlanta, Georgia, for Appellants. Andrew Freder-

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## OPINION

WILKINSON, Chief Judge:

After a series of violent prison incidents involving members of the Five Percent Nation of Islam (the Five Percenters), the South Carolina Department of Corrections (SCDC) classified the Five Percenters as a Security Threat Group (STG). Acting under its Security Threat Group policy, the SCDC then transferred all Five Percenters to administrative segregation or to maximum custody confinement. A number of those inmates filed suit, raising challenges to this policy under the Free Exercise Clause, the Equal Protection Clause, and the Eighth Amendment of the Constitution. The district court granted summary judgment to the defendant officials of the SCDC, and the inmates appeal. Because the designation of the Five Percenters as an STG was a rational response to a threat to prison safety — a concern peculiarly within the province of penal authorities — we affirm the judgment of the district court.

### I.

This case concerns the long-term segregation under the SCDC's Security Threat Group policy of inmates affiliated with the Five Percenters, a group which appellants describe as a religious sect and which appellees claim is a violent gang. In fact, it was the history of violence involving Five Percenters that led to the group's classification as a security threat. In early 1995 three such incidents occurred

in SCDC facilities. That January a group of Five Percenters assaulted three other inmates at Lieber Correctional Institution, requiring the intervention of corrections personnel. In a second incident that same month, a group of Five Percenters attacked three correctional officers at the Allendale Correctional Institution, beating those officers with their own batons and assaulting them with their own pepper spray. As a result, each of the victims was hospitalized. The incident report for the Allendale attack reported that "these five inmates acted as a group," that they "felt as if they were acting in a manner acceptable to the[ir] religious beliefs," and that they "spoke of more violence to come."

The third, most serious incident occurred in April 1995, when six Five Percenters and one other inmate staged a riot in the Broad River Correctional Institution. Wielding knives, softball bats, and a variety of improvised weapons, the inmates attacked and severely injured several correctional officers in the prison cafeteria and yard. The inmates then seized one officer and two food service employees as hostages, leading to an eleven-hour standoff with law enforcement personnel. Four officers were hospitalized as a result of these events.

The SCDC's problems with the Five Percenters were neither new nor unique. In 1992 an inmate in the Central Correctional Institution reported being stabbed and beaten by a group of Five Percenters. Furthermore, according to the unit manager of the Lee Correctional Institution, a group of Five Percenters had been active in that facility as early as 1993, stealing from and preying on weaker inmates and on one occasion attempting to start a riot. In addition, SCDC Director Michael Moore learned that the Five Percenters had been active in prison systems in New Jersey, New York, North Carolina, and Virginia.

On June 16, 1995, SCDC Director of Security Kenneth McKellar sent Moore a memorandum referring generally to the Five Percenters' history of violence and describing specifically the Broad River hostage taking. In addition, the memorandum informed Moore that both the New Jersey Department of Corrections and the Federal Bureau of Prisons had classified the Five Percenters as a threat group. McKellar attached to this memo a New Jersey intelligence report describing the Five Percenters as "a group of individuals who espouse violence as

a means to an end." A federal intelligence summary, also obtained by the SCDC, called the Five Percenters a "radical Islamic sect/criminal group" that "is often boldly racist in its views, prolific in its criminal activities, and operates behind a facade of cultural and religious rhetoric." Based on this information and the SCDC's own experience, McKellar recommended and Moore approved the designation of the Five Percenters as an STG in South Carolina.

The SCDC's Security Threat Group policy defines an STG as

> any formal or informal organization, association, or group of three (3) or more inmates that have a common name, and whose members or associates engage or have engaged in two (2) or more activities that include planning, organizing, threatening, financing, soliciting or committing unlawful acts or acts of misconduct classified as serious threats or potential threats to the safety and security of the public, the Department, employees, visitors and/or other inmates.

SCDC Policy No. OP-21.01.[1] The SCDC Director may designate a group as an STG after consideration of, among other things, the group's history of unlawful activity in the SCDC or other prison system, its history of unlawful activity in the community, its organizational structure, and its propensity for violence. SCDC Procedure No. OP-21.01(OP). This designation permits penal institutions to remove all inmates affiliated with the STG from the general prison population, to reclassify them to a higher custody level, and hence to increase the restrictiveness of their confinement.

Classification of an individual as an STG member requires approval up the prison's chain of command, including the approval of the prison warden and the SCDC Deputy Director of Operations. An inmate who is classified as an STG member is notified of that fact and given an opportunity to respond. An inmate may be released from

[1]Citations to the STG Policy and Procedure are to the versions of those instruments, dated May 15, 1996, that were presented to the district court and to this court. There has been no suggestion that these documents are not representative of the STG policy and procedure in effect in June 1995.

STG status only if the Director removes the STG designation from his group, if the SCDC finds that it has misidentified the inmate, or if the inmate renounces his affiliation with the group.

SCDC institutions proceeded to identify individual Five Percenters and to adjust their security classifications. Those inmates — numbering approximately three hundred at the outset and approximately sixty-four as of March 1997 — were confined in administrative segregation and in maximum custody, both of which require full-time in-cell confinement except when the inmates shower or take recreation.

In the summer of 1995 a number of those inmates filed suits in the United States District Court for the District of South Carolina. After their cases were consolidated, the appellants filed an amended complaint asserting claims under the Constitution and 42 U.S.C. § 1983. Specifically, the inmates alleged that the designation of the Five Percenters as an STG violated the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. They also claimed that their indefinite high-security confinement violated the Eighth Amendment.[2] Their complaint named Moore, McKellar, and William Catoe, Deputy Director for Operations of the SCDC, in their personal and official capacities, and requested injunctive relief and damages.

The Five Percenters moved for a preliminary injunction and the defendants moved for summary judgment. The district court granted the defendants' motion with regard to the free exercise, equal protection, and Eighth Amendment claims. The Five Percenters appeal.[3]

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[2]Appellants raised three other claims that are not at issue in this appeal. The first, a challenge to a ban on the possession of Five Percenter literature, was settled by the parties after the district court enjoined the restriction. The second, based on the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, was withdrawn in light of the Supreme Court's intervening decision in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). The third, based on the Due Process Clause, has been abandoned.

[3]The Five Percenters also appeal the district court's refusal to certify a class action in this case. The court reasoned that the joinder of all parties would not be impracticable, Fed. R. Civ. P. 23(a)(1), and chose instead to consolidate all Five Percenter cases pursuant to Rule 42(a). We do not think the district court abused its discretion in declining to certify a class. *See Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 757 (4th Cir. 1998).

II.

We first address the Five Percenters' claim under the Free Exercise Clause of the First Amendment. Although the parties vigorously dispute whether the Five Percenters even constitute a religious group, the district court did not attempt to resolve this question. Rather, the court assumed — as do we — that the Five Percenters are a religious group entitled to First Amendment protection. We thus avoid the "difficult and delicate task" of examining the nature and sincerity of the inmates' professed beliefs. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981); *see Patrick v. LeFevre*, 745 F.2d 153 (2d Cir. 1984).

Our review of the challenged SCDC action is nevertheless highly deferential. Even assuming that analogous action outside the prison context would violate the Constitution, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987); *accord O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987); *Hines v. South Carolina Dep't of Corrections*, 148 F.3d 353, 358 (4th Cir. 1998).[4] This standard reflects a basic reality of conviction and confinement: Although prisoners are not completely without the Constitution's protection, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *O'Lone*, 482 U.S. at 348 (internal quotation marks omitted). For that reason, "once the Department demonstrates that it is pursuing a legitimate governmental objective, and demonstrates some minimally rational relationship between that objective and the means chosen to achieve that objective, we must approve of those means." *Hines*, 148 F.3d at 358.

The rationale for judicial deference is greatest when the maintenance of prison order is at stake. By using the language of rational

[4]Although the parties debate the import of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), we think it contrary to the teachings of *Turner* to transpose the doctrine of non-prison cases into the prison context. Indeed, restrictions that would clearly violate the Constitution outside the prison setting may be rationally based within that setting.

basis scrutiny, the Supreme Court chose the most deferential possible standard of review for cases presenting such issues of prison administration. The Supreme Court also explicitly rejected heightened judicial scrutiny of prison security policies. Rigorous scrutiny, the Court noted, is simply "not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons." *Thornburgh v. Abbott*, 490 U.S. 401, 409-10 (1989). "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner*, 482 U.S. at 89. In the difficult and dangerous business of running a prison, front-line officials are best positioned to foresee threats to order and to fashion responses to those threats. Hence, the "evaluation of penological objectives is committed to the considered judgment of prison administrators, 'who are actually charged with and trained in the running of the particular institution under examination.'" *O'Lone*, 482 U.S. at 349 (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)). When a state correctional institution is involved, the deference of a federal court is even more appropriate. *Turner*, 482 U.S. at 85. Prison officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547.

The SCDC's Security Threat Group policy has exactly that objective. According to the SCDC, the purpose of the STG policy is "to promote the secure, safe, and orderly operations of all SCDC institutions, . . . to facilitate the early detection of [STG] activities and members and to ensure, to the extent possible, efficient intervention into possible volatile situations." SCDC Policy No. OP-21.01. These are not simply legitimate penological interests — they are compelling. *Hines*, 148 F.3d at 358.

The Five Percenters do not — and cannot — claim that the STG policy itself is not rationally related to the furtherance of the legitimate end of prison security. The STG policy requires the assessment, monitoring, identification, and evaluation of all groups "whose members or associates engage or have engaged in . . . planning, organizing, threatening, financing, soliciting or committing unlawful acts or

acts of misconduct." SCDC Policy No. OP-21.01. And once a group has been designated as an STG, its members are identified, reclassified, and separated from the general prison population. By removing those inmates who systematically engage in violence and other unlawful acts from the general population and by increasing the security of their confinement, the STG policy targets a core threat to the safety of both prison inmates and officials. The nexus between this policy and the maintenance of prison safety is self-evident.

The Five Percenters do, however, challenge the application of the STG policy to their own group. Under *Turner v. Safley*, several factors "are relevant to, and serve to channel" our consideration of the rationality of the SCDC's actions. *Thornburgh*, 490 U.S. at 414. First, like the STG policy itself, the designation of the Five Percenters as a Security Threat Group is rationally related to the legitimate objective of penal security. There is ample evidence in the record supporting the reasonableness of Moore's conclusion that the Five Percenters as a group posed a threat to prison safety. Five Percenters had been involved in three serious acts of violence in the SCDC system in the first four months of 1995. One of those incidents involved an assault on fellow inmates, while the other two resulted in the hospitalization of prison correctional officers. Additionally, Moore presented evidence that the New Jersey Department of Corrections and the Federal Bureau of Prisons had identified the Five Percenters as a racist, violent group presenting an organized threat to prison security. In light of the information that Moore had before him, the decision to designate the Five Percenters as an STG was eminently rational.

Second, "other avenues remain available" for the Five Percenters to exercise their religious practices in administrative segregation and in maximum custody. *Turner*, 482 U.S. at 90 (internal quotation marks omitted). Even in high-security confinement the Five Percenters remain free to pray, fast, and study religious materials. Although the inmates are unable to participate in group meetings, they are not "deprived of all means of expression." *O'Lone*, 482 U.S. at 352 (internal quotation marks omitted).

Third, the accommodation of the Five Percenters' asserted rights would come at too high a cost. *See Turner*, 482 U.S. at 90. Prison administration often involves tough tradeoffs. In the closed environ-

ment of a prison, greater liberties for some may mean increased danger and intimidation for others. Because increased freedom for the Five Percenters would come "only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike," we are particularly reluctant to interfere with the judgment of the SCDC in this case. *Id.* at 92-93.

Finally, there are no ready alternatives to the SCDC's course of action. *See id.* at 90-91. The Five Percenters urge that the SCDC should only segregate an inmate after making an individual assessment of that inmate's dangerousness. But this would simply reimpose the regime that existed before the STG classification — a regime that Moore concluded posed an unacceptable danger to corrections officers and to other inmates. When confronted with a threat to order, "[r]esponsible prison officials must be permitted to take reasonable steps to forestall such a threat, and they must be permitted to act before the time when they can compile a dossier on the eve of a riot." *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 132-33 (1977); *accord United States v. Stotts*, 925 F.2d 83, 87 (4th Cir. 1991). Allowing prison officials to act only after a demonstration of individual dangerousness would deprive them of the all-important option of prevention. The threat of violence here was a group threat, and prison administrators were entitled to address it in those terms.

The Five Percenters offer three arguments why the SCDC's actions were unreasonable. Initially, the inmates protest that they are not a racist group and that they do not promote violence. They dispute some incidents reported by the SCDC, contend that others involved only a few inmates, and suggest that these were isolated cases. But to draw these inferences in the inmates' favor would turn *Turner*'s command of judicial deference on its head. The question is not whether Moore's conclusion was indisputably correct, but whether his conclusion was rational and therefore entitled to deference. *See Jones*, 433 U.S. at 127-28. Confronted with multiple reports of an identifiable group whose members not only threatened but had actually committed serious, violent acts in the SCDC system and elsewhere, Moore's decision to designate the Five Percenters as an STG was manifestly a rational action.

Next, the Five Percenters contend that the application of the STG policy to their group is irrational because it is not "content neutral,"

inasmuch as it operates against the inmates on the basis of their group affiliation. But *Turner*'s only requirement of neutrality is that the interest being furthered be "unrelated to the suppression of expression." *Thornburgh*, 490 U.S. at 415 (internal quotation marks omitted). Here, the STG policy is not aimed at anyone's freedom of expression. Rather, it rationally furthers the neutral policy of protecting prison security and order. It therefore does not violate the Constitution.

The Five Percenters finally question the SCDC's policy of releasing from administrative segregation those prisoners who renounce their affiliation with the group. But since the SCDC may classify inmates on the basis of their affiliation with the Five Percenters, declassifying those inmates who renounce that affiliation does not suddenly render the policy irrational. We do not think prison officials should be in the practice of prescribing — or proscribing — anyone's private religious beliefs. That is not their province. But it is up to the SCDC to determine when an inmate is safe to return to the general population. If the SCDC wishes to hinge that determination on the renunciation of affiliation with a violent — albeit assertedly religious — group, it may do so.

Although the Five Percenters would have us second-guess the SCDC in this most critical area of prison security, the Constitution does not mandate such intrusion. Because the SCDC's decision to designate the Five Percenters as an STG is rationally related to the legitimate end of prison safety and security, it does not offend the Free Exercise Clause.

III.

The Five Percenters further claim that the application of the STG policy to their group violates the Equal Protection Clause. But they offer no evidence that similarly situated groups of inmates — religious or otherwise — have been treated differently under the STG policy, much less that the SCDC has acted with a discriminatory purpose.[5] "There is nothing in the Constitution which requires prison

[5]We therefore need not proceed to the succeeding question of whether the inmates' differential treatment, had it occurred, would have been

officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence." *Jones*, 443 U.S. at 136. The inmates have simply failed to show that the SCDC violated their equal protection rights.

IV.

The Five Percenters finally contend that their long-term segregated confinement violates the Eighth Amendment. The inmates complain that they are confined to their cells for twenty-three hours per day without radio or television, that they receive only five hours of exercise per week, and that they may not participate in prison work, school, or study programs. These conditions are indeed restrictive, but the restrictive nature of high-security incarceration does not alone constitute cruel and unusual punishment. *Sweet v. South Carolina Dep't of Corrections*, 529 F.2d 854, 857 n.1 (4th Cir. 1975) (en banc). To make out a violation of the Eighth Amendment, the inmates "must show both (1) a serious deprivation of a basic human need; and (2) deliberate indifference to prison conditions on the part of prison officials." *Strickler v. Waters*, 989 F.2d 1375, 1379 (4th Cir. 1993) (internal quotation marks omitted). This inquiry has objective and subjective prongs; the Five Percenters' claim founders on both of them.

First, the Five Percenters have not shown that the conditions in administrative segregation or maximum custody work a serious deprivation of a basic human need. *See Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). The inmates do not contend that the SCDC has failed or will fail to provide them with "adequate food, clothing, shelter, and medical care" or to protect them from harm. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). And the isolation inherent in administrative segregation or maximum custody is not itself constitutionally objec-

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rational under *Turner*. *See Benjamin v. Coughlin*, 905 F.2d 571, 575 (2d Cir. 1990); *see also Salaam v. Collins*, 830 F. Supp. 853, 859 (D. Md. 1993) ("Unless . . . plaintiffs can show that the challenged regulation impinges on a constitutional right — which in an equal protection setting requires a showing of discriminatory intent — the *Turner/O'Lone* [standard] is not properly invoked."), *aff'd sub nom. Calhoun-El v. Robinson*, 70 F.3d 1261 (4th Cir. 1995) (table).

tionable. Indeed, this court has noted that "isolation from companionship, restriction on intellectual stimulation[,] and prolonged inactivity, inescapable accompaniments of segregated confinement, will not render [that] confinement unconstitutional absent other illegitimate deprivations." *Sweet*, 529 F.2d at 861 (internal quotation marks omitted).

Moreover, the indefinite duration of the inmates' segregation does not render it unconstitutional. Appellants complain that they have already been confined in administrative segregation or maximum custody for over three years, and that they do not expect to be released in the foreseeable future. The duration of confinement in some of these cases has been long, but length of time is "simply one consideration among many" in the Eighth Amendment inquiry. *Hutto v. Finney*, 437 U.S. 678, 687 (1978); *see Sweet*, 529 F.2d at 861-62. Although the Five Percenters claim that their segregation has caused them to become depressed, the only evidence submitted on this point were the affidavits of a few inmates asserting that the overall conditions of their confinement have placed them under "great stress" and caused them "great emotional and physical suffering." Depression and anxiety are unfortunate concomitants of incarceration; they do not, however, typically constitute the "extreme deprivations . . . required to make out a conditions-of-confinement claim." *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992). A depressed mental state, without more, does not rise to the level of the "serious or significant physical or emotional injury" that must be shown to withstand summary judgment on an Eighth Amendment charge. *Strickler*, 989 F.2d at 1381; *see Lopez v. Robinson*, 914 F.2d 486, 490 (4th Cir. 1990).

Second, the SCDC has not been deliberately indifferent to the inmates' needs. *See Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Shakka v. Smith*, 71 F.3d 162, 166-67 (4th Cir. 1995). In fact, the opposite appears to be true. The SCDC's procedures for administrative segregation provide for periodic visits by medical personnel and for the referral of inmates displaying mental health problems for treatment. SCDC Procedure No. 1500.13. The Five Percenters do not allege that these procedures have not been followed — indeed, two inmates attest that they are receiving medication for their conditions, and another states that he has refused such attention. *See Taylor v. Freeman*, 34 F.3d 266, 271-72 (4th Cir. 1994) (finding remedial mea-

sures probative of a lack of official indifference). Since the Five Percenters have failed to "come forward with evidence from which it can be inferred that the defendant-officials were . . . knowingly and unreasonably disregarding an objectively intolerable risk of harm," *Farmer*, 511 U.S. at 845-46, summary judgment on this claim was likewise proper on the basis of the defendants' state of mind.

V.

In sum, we hold that the long-term segregation of the Five Percenters is rationally based, and therefore that it does not violate the Free Exercise Clause. We further hold that the SCDC has not violated the Equal Protection Clause or the Eighth Amendment.[6] We therefore affirm the judgment of the district court.

*AFFIRMED*

[6]Since we hold that there has been no constitutional violation, there is no need to address the qualified immunity of the individual defendants.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 19, 1999

No. 98-7337
CA-96-5555-2-23AJ

In Re: LONG TERM ADMINISTRATIVE SEGREGATION OF INMATES DESIGNATED AS FIVE PERCENTERS

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ALEXANDER MICKLE, DONNATHIAN GRANT, AMEED STEVENSON, SHALEEK AZEEM, ANTONIO ROACH, FOUNTAIN WISE ALLAH, VON HUGGINS, JAMES HUGHES, LORD MUSA GOD ALLAH, EQUALITY KING SUPREME ALLAH, WAYNE HEMINGWAY, KIRONDA HAYNES, JAMES ZIMMERMAN, PRINCE HUGHES, MILTON DOZIER, GREGORY MOMENT, CLARENCE CARTER, RAHEEM MALIK SHABAZZ, TEJIE WHITE, GROVER LUMPKIN, BOOKER WILLIAMS, WAYNE SAMUELS, CHARVELL DOUGLAS, QUINTA PARKER, ELIJAH SMITH, VON HUGGINS, QUINTA PARKER, TONY ADDISON, MAURICE JACQUES, LEROY SMALLS, EDWARD WASHINGTON, LARRY NELSON, DERRICK DUNBAR, RALPH DAVIS, BRITTIE COOKE, LEROY BRICE, JERMAINE DILLARD, LORD SHAMEAL ALLAH, JAMES HARRINGTON, TYRONE MITCHELL, ALBERT JONES, DAVID CROSS, MAURICE EDWARDS, JOHN FRAZIER,

Plaintiffs - Appellants

v.

MICHAEL MOORE, Commissioner; WILLIAM CATOE, Deputy Director for Operations, South Carolina Department of

Corrections; KENNETH D. MCKELLAR, Director of Security, South Carolina Department of Corrections in their official and individual capacities

Defendants -- Appellees

and

SCDC

Defendant

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On Petition for Rehearing and Rehearing En Banc

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The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of the Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

**IT IS ORDERED** that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

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CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

| | | |
|---|---|---|
| ALEXANDER MICKLE, et al. | ) | FILED |
| | ) | Dec. 3, 1997 |
| Plaintiff, | ) | |
| v. | ) | C.A. No. 2:96-5555-23AJ |
| MICHAEL MOORE, Director of the South Carolina Department of Corrections, et al., | ) | **ORDER** |
| Defendants. | ) | |

This matter is before the court upon the magistrate judge's recommendation that the defendants' motion for summary judgment be granted in part and denied in part. The record contains two reports and recommendations of the United States Magistrate made in accordance with 28 U.S.C. § 636 (b)(1)(B). The first report and recommendation, filed on July 1, 1997, pertains to Plaintiffs' Motion for a Preliminary Injunction. The second report and recommendation, filed on July 23, 1997, pertains to Defendants' Motion for Summary Judgment.

## I. TIME FOR FILING OBJECTIONS

A party may object, in writing, to a magistrate's report within ten days after being served with a copy of that report. 28

U.S.C. § 636 (b)(1). Three days are added to the ten-day period if the recommendation is mailed rather than personally served. Plaintiffs filed timely objections to the first report and recommendation on July 9, 1997. Plaintiffs filed timely objections to the second report and recommendation on August 5, 1997. Defendants filed timely objections to the second report and recommendation on August 11, 1997.

## II. REVIEW OF THE MAGISTRATE'S REPORTS

This court must conduct a de novo review of any portion of a magistrate's report to which a specific objection is registered and may accept, reject, or modify, in whole or in part, the recommendation contained in that report. 28 U.S.C. § 636 (b)(1).

Plaintiffs have filed objections to the magistrate's recommendation that their Motion for a Preliminary Injunction should be denied. The magistrate based his recommendation on the fact that Plaintiffs' motion was based on the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq., which has been ruled unconstitutional by the United States Supreme Court. It appears that, prior to the magistrate's issuance of his report and recommendation, Plaintiffs filed an amended brief which included an argument that Defendants' actions violated the First Amendment, as well as a RFRA argument. However, in recommending that Plaintiffs' request for a preliminary injunction be denied, the magistrate considered only Plaintiffs' RFRA argument, and not the First Amendment argument contained in their amended brief.

Plaintiffs have also filed objections to the magistrate's recommendation that Defendants' Motion for Summary Judgment should be granted with respect to Plaintiffs' claims that the higher security classification and segregated custody imposed on the Five

Percenters group violates the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Eighth Amendment. Plaintiffs also object to the magistrate's recommendation that Defendants should be entitled to qualified immunity from money damages on all of their claims. Defendants have filed objections to the magistrate's recommendation that their Motion for Summary Judgment should be denied as to Plaintiffs' claim that Defendants are violating the First Amendment by banning Five Percenters literature entirely from all South Carolina Department of Corrections (SCDC) facilities.

For organizational purposes, this Court will consider Defendants' Motion for Summary Judgment first, and then will proceed to consider Plaintiffs' Motion for a Preliminary Injunction.

## III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A review of the objections and the record indicates that the magistrate's report and recommendation accurately describes the facts of this case and the applicable law. Accordingly, this Court adopts and incorporates the magistrate's report and recommendation into this Order.

### A. Summary Judgment Standard

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted

against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 123-124 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trail." Celotex, 477 U.S. at 322. The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.'" Hughes v. Bedsole, 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990), cert. denied, 116 S. Ct. 190 (1995)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses (that] have no factual bases." Celotex, 477 U.S. at 327.

**B. Discussion**

As an initial matter, it should be noted that the magistrate did not decide the question of whether the Five Percenters constitute a "religion" as a matter of law. The magistrate merely assumed, for the purposes of this motion, that the Five Percenters are a religion, noting that the question of whether a set of beliefs constitutes a religion is ill-suited for resolution on summary judgment. Magistrate's Report and Recommendation, pp. 8-9. In

analyzing the parties' objections to the magistrate's Report and Recommendation, this Court will follow his assumption that the Five Percenters are a religion. It is worth noting that the only federal circuit court to consider this issue reversed and remanded a district court determination that the Five Percenters are not a religion, although it did not affirmatively hold that they are a religion. Patrick v. Lefevre, 745 F.2d 153 (2nd Cir. 1984).

(1) Plaintiffs' Objections to the Magistrate's Report and Recommendation

Plaintiffs assert that Defendants overreacted to the actions of a few "bad apples" within the Five Percenters group when they classified the Five Percenters as a security threat group and placed them in isolated, high-security custody. Plaintiffs further assert that Defendants' actions violate their rights protected under the First Amendment, Eighth Amendment, and Equal Protection Clause of the Fourteenth Amendment.

*(a) First Amendment*

As the magistrate noted in his recommendation, Plaintiffs' First Amendment claims are evaluated under the test established by the Supreme Court in Turner v. Safley, 482 U.S. 78 (1987). See also O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding that the Turner test applies to claims that prison regulations violate First Amendment right to free exercise of religion). The Turner Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Id. at 89. It then articulated four factors relevant to assessing the reasonableness of prison regulations:

(1) Whether there is a "valid, rational connection" between the regulation and the government interest put forward to justify it;

(2) Whether alternative means of exercising the rights in question remain open to the inmates;

(3) The impact that accommodation of the asserted rights will have on prison guards, other inmates, and the allocation of prison resources;

(4) Whether there is an absence of "ready alternative" available to prison officials by which they may accomplish the goals of the regulation at issue.

Id. at 89-90.

With regard to the first factor, Defendants assert that the history within SCDC facilities, as well as other prison systems nationwide, demonstrates that the Five Percenters, as a group, constitute a threat to institutional security and safety. The magistrate concluded that the "undisputed evidence" in the record supports Defendants' assertion. Plaintiffs, on the other hand, contend that the evidence in the record is far from undisputed, and that it shows that only a small percentage of Five Percenters have any record of involvement in incidents of violence in SCDC facilities.[1] The operative inquiry under the first prong of Turner,

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[1] The exact numbers and percentages of Five Percenters that have been involved in prison disturbances is unclear from the record. By Plaintiffs' own computations, however, it appears that at least eighteen Five Percenters were involved in at least five separate incidents of prison violence in SCDC facilities between August of 1992 and April of 1995.

however, is more than a matter of mere percentages -- the issue is whether Defendants, given the full body of information regarding the Five Percenters that was available to them, could rationally conclude that segregating the entire group would advance the legitimate interests of institutional security. In addition to containing evidence of Five Percenter involvement in several prison disturbances at SCDC facilities, the record also demonstrates that Defendants possessed information to the effect that at least one other state (New Jersey) and the United States Bureau of Prisons have designated the Five Percenters as a security threat group. See Defendants' Exhibits 9 and 10. Given this information, the magistrate did not err when he concluded that placing the Five Percenters in a higher security category is rationally and reasonably related to the legitimate penological interest of promoting safety and security in SCDC facilities.

The second Turner factor asks whether alternative means of exercising their rights remain open to Plaintiffs. In this case, it appears from the record that confinement of Five Percenters to heightened-security segregated custody eliminates their ability to gather and to meet in "cyphers" or "universal parliaments," which are dictated by their beliefs. However, the record reflects that the decision to place Plaintiffs in isolated custody was largely based on the rationale that, as described above, further violence could be averted by separating the Five Percenters from the prison population and preventing them from gathering in groups. Therefore,

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Plaintiffs' computations also demonstrate that, of the 64 inmates still confined in heightened-security segregated custody as Five Percenters, at least eleven (or 17.2%) are documented by Defendants as having been involved in prison disturbances. See Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, pp. 22-23.

allowing Plaintiffs out of isolated custody to gather for "cyphers" and "universal parliaments"' would risk re-creating the security and safety threats that such custody was meant to avoid in the first place. Thus, there is no alternative to this restriction on Plaintiffs' religious practices.

It should be noted that this restriction does not totally prevent Plaintiffs from practicing their religion. Indeed, the magistrate correctly noted that numerous other means of practicing their religion are available to Plaintiffs. They may pray, meditate, fast, follow dietary restrictions, and study the Qu'ran, the Bible, and literary materials of the Nation of Islam.[2] It is apparent from the record that, while the restrictions will hinder Plaintiffs' abilities to practice their religion somewhat, it will not foreclose all, or even most, of Plaintiffs' religious practices.

The third Turner factor concerns the impact that accommodating Plaintiffs' asserted rights would have on prison staff, resources, and other inmates. Plaintiffs assert that those Five Percenters who have been confined in segregated custody solely because of their affiliation with the Five Percenters group should be released into the general population, and that such a measure would have only minimal impact on the rest of the prison. The magistrate, however, noted that a court should be reluctant to

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[2] Under the measures imposed by Defendants, Plaintiffs are prohibited from possessing certain pieces of Five Percenters literature. However, the magistrate concluded that the literature ban is too restrictive and that Plaintiffs may be allowed access to properly censored Five Percenters literature. As discussed in greater detail infra, this Court finds the magistrate's conclusion with respect to the literature ban to be correct -- therefore, the lifting of the absolute ban on Five Percenters literature provides Plaintiffs with yet another means of practicing their religion.

second-guess the judgment of prison officials on such a matter. Furthermore, the magistrate stated that, when prison officials have identified members of a group that subscribes to a philosophy of racial hostility, they should not be required to wait for those inmates to act on that philosophy before taking steps to separate them from the rest of the prison population. Plaintiffs object to this conclusion on the grounds that the record fails to establish the requisite racial animus of the Five Percenters, and that the SCDC and several federal courts have recognized that certain other groups with racially-biased beliefs constitute bona fide "religions." Thus, they appear to argue that, whatever racism is inherent in the Five Percenters' beliefs, it does not justify placing all Five Percenters in segregated custody.

In truth, the existence (or non-existence) of a racial element within Plaintiff's belief system is incidental to the analysis required by the third Turner factor. That factor simply asks whether accommodation of Plaintiffs' asserted rights would impact the smooth administration of the prison. In this case, as described above, Defendants possessed competent information displaying a pattern of involvement by Five Percenters in several violent incidents in SCDC facilities, as well as indicating that the group adhered to certain racially-biased philosophies. From that information, they reasonably concluded that prison security would be improved by segregating the Five Percenters from the rest of the prison population. Accommodating Plaintiffs' asserted rights (which would entail releasing many or all of the Five Percenters back into the general population) would, again, run the risk of creating the very security risk which Defendants intended to alleviate -- thus, it can hardly be said that the impact on prison administration would be "minimal." "When accommodation of an asserted right would have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential

to the informed discretion of corrections officials." Turner, 482 U.S. at 90. Thus, the magistrate did not err in concluding that the third Turner factor weighs in Defendants' favor.

The fourth and final Turner factor requires determining whether there are any "ready alternatives" to Defendants' actions. The existence of obvious, easy alternatives to the restrictions imposed by Defendants (specifically, the placement of the Five Percenters in high-security isolated custody) is evidence that such restrictions are not reasonable. Id. at 90. However, given the close relationship between the third and fourth factors, the magistrate correctly noted that prison officials deserve deference with regard to this issue as well. Id.; O'Lone, 482 U.S. at 349-350, 353. In this case, the "alternative" for which Plaintiffs argue would require releasing the Five Percenters back into the prison population and monitoring them, and presumably waiting until one or more of them become involved in a violent incident before placing them in segregated custody. The magistrate concluded that, given the information on which Defendants based their actions and the strong policy of deference to prison officials as articulated by the Supreme Court, it would be improper for a court to tell Defendants that they must wait for further incidents of violence to act. Based on the above review, this Court finds no error with that conclusion.

*(b) Equal Protection Clause*

Plaintiffs argue, as above, that their placement in segregated custody is an exaggerated response to the actions of a few "bad apples" within their group. They further argue that such a response amounts to unconstitutional discrimination, because Defendants have never placed all members of any other religious group in segregated custody because of the acts of a few "bad

apples."

Plaintiffs are correct in asserting that prisoners do not forfeit their rights to be free from unconstitutional discrimination on the basis of religion. However, courts have recognized that practical concerns of prison administration may weigh on the degree to which a particular religion must be accommodated. For example, while Plaintiffs cite the case of Al-Alamin v. Gramley, 926 F.2d 680 (7th Cir. 1991), for the proposition that all inmates must receive "qualitatively comparable" treatment, the same case acknowledges that "security constraints may require that the needs of inmates adhering to one faith be accommodated differently from those adhering to another." Id. at 686.

While the Fourth Circuit has not conclusively spoken on the issue, the Supreme Court has indicated that the determination of whether Plaintiffs' Equal Protection rights have been violated should follow the same four-factor Turner analysis described above. In Washington v. Harper, 494 U.S. 210 (1990), the Supreme Court noted that the Turner standard applies "when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." Id. at 223 (holding that lower court erred in not applying Turner "reasonableness" standard to prisoner's claim of due process violations). Moreover, several other circuits, as well as several district courts within this circuit, have determined that the Turner "reasonableness" standard governs prisoners' equal protection claims. See, e.g. Allen v. Cuomo, 100 F.3d 253, 261 (2nd Cir. 1996); Jenkins v. Angelone, 948 F. Supp. 543, 549 (E.D. Va. 1996); Shaheed v. Winston, 885 F. Supp. 861, 868-869 (E.D. Va. 1995); Salaam v. Collins, 830 F. Supp. 853, 855-859 (D. Md. 1993), aff'd, 70 F.3d 1261 (4th Cir. 1995). Therefore, there can be no violation of the Equal Protec-

tion Clause if Defendants' actions were "reasonably related to a legitimate penological interest." As described in the above section, the magistrate did not err in concluding that Defendants' placement of Plaintiffs in segregated custody was reasonably related to the legitimate concern of institutional security. Just as that conclusion precluded Plaintiffs' claims of First Amendment violations, it also precludes Plaintiffs' claims under the Equal Protection Clause.

*(c) Eighth Amendment*

The magistrate correctly noted that, in the Fourth Circuit, a prisoner seeking to assert a claim under the Eighth Amendment must make a prima facie showing of (1) a serious deprivation of a basic human need, and (2) deliberate indifference to prison conditions on the part of prison officials. Strickler v. Waters, 989 F.2d 1375, 1379 (4th Cir. 1993). He went on to conclude that Plaintiffs had not presented sufficient evidence of a "serious deprivation" or of "deliberate indifference" by prison officials to support their claim.

In objecting to the magistrate's conclusion, Plaintiffs assert that the "harsh and restrictive" conditions of confinement in segregated custody, as well as the duration of their confinement, violate the Eighth Amendment. Plaintiffs cite Hutto v. Finney, 437 U.S. 678 (1978), for the proposition that the duration of one's confinement is a relevant factor in determining whether the confinement constitutes cruel and unusual punishment. However, while the duration of one's confinement may be relevant to the issue of whether the punishment violates the Eighth Amendment, it is not controlling. Ross v. Reed, 719 F.2d 689, 697 (4th Cir. 1983); Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854, 861 (4th Cir. 1975). Moreover, the mere existence of harshly

restrictive conditions of confinement does not, by itself, constitute an Eighth Amendment violation -- as described above, the prisoner must also produce evidence of a serious "medical and emotional deterioration attributable to the challenged condition." Lopez v. Robinson, 914 F.2d 486, 490 (4th Cir. 1990). Lopez also cites Turner and O'Lone for the proposition that courts should exercise restraint before concluding that prison officials' conduct constitutes deliberate indifference.

In this case, the magistrate correctly noted that only five of the approximately 50 plaintiffs claim to have suffered adverse emotional or psychological effects associated with segregated custody. Plaintiffs, however, cannot point to any evidence that those who required medical treatment did not receive it, nor is there any other evidence that Plaintiffs have been subjected to living conditions that are otherwise substandard, much less unconstitutional. As noted above, long-term isolated custody does not, in and of itself, present a constitutional violation, even if it entails very restrictive conditions which cause some degree of psychological stress. While prolonged isolation and restricted activity can be threats to a person's psychological and emotional health, "Eighth Amendment standards are offended by prolonged and indefinite confinement only when basic nutrition, sanitation, and health standards are ignored or when the segregated confinement bears no reasonable relation to the purpose for which a prisoner is committed" Bukhari v. Hutto, 487 F. Supp. 1162, 1170 (E.D. Va. 1980) (citing Hutto v. Finney and Sweet). In this case, since there is no evidence that Plaintiffs suffered a deprivation of "basic human needs" or that prison officials have been "deliberately indifferent" to their well-being, the magistrate was correct in concluding that Defendants are entitled to summary judgment on Plaintiffs' Eighth Amendment claim.

*(d) Qualified Immunity*

The magistrate concluded that Defendants are entitled to qualified immunity from money damages based on the rationale that a reasonable prison official could have determined that the Five Percenters were nothing more than a prison gang, and not a true religion. Thus, the magistrate reasoned, it follows that a reasonable prison official could determine that imposing restrictions on inmates based on their status as members of the Five Percenters group would not violate any of the inmates' clearly established constitutional rights. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (Officials are shielded from liability for damages unless their conduct violates "clearly established constitutional or statutory rights of which a reasonable person would have known."); Rowland v. Perry, 41 F.3d 167, 172-173 (4th Cir. 1994) (Determining "reasonableness" for qualified immunity purposes requires examining the objective facts as perceived by the public official at the time of the challenged action).

As in their summary judgment brief, Plaintiffs continue to argue that no reasonable public official could conclude that the Five Percenters are not a religion. However, Plaintiffs can point to no case which has held that the Five Percenters are a religion -- the best that they can do is cite several cases recognizing that the Nation of Islam (to which the Five Percenters bear certain similarities) is a recognized religion. The record indicates that, at the time that Defendants decided to place the Five Percenters in segregated custody, they possessed information regarding involvement of the Five Percenters in several disturbances at SCDC facilities, classification of the Five Percenters as a threat group in at least two other prison systems, and the opinion of the Muslim Chaplain for the SCDC that the Five Percenters were a gang that attempted to align themselves with Muslim teachings to create the appearance of a

legitimate religion. See Defendants' Exhibit 7. Given this information, it is clear that a reasonable prison official could conclude that the Five Percenters are a gang, and that restrictive measures of the types imposed by Defendants would directly improve prison security and safety. Accordingly, the magistrate correctly concluded that Defendants are entitled to qualified immunity from money damages.

(2) Defendants' Objections to the Magistrate's Report and Recommendation

Defendants object to the magistrate's recommendation that their Motion for Summary Judgment be denied as to Plaintiff's claim challenging the SCDC's prohibition on inmate possession of Five Percenter literature. In formulating his recommendation, the magistrate correctly noted that this issue is controlled by the four-part Turner "reasonableness" test described in the previous section. As described above, the Supreme Court has applied the Turner test in cases involving prison regulations that implicate the First Amendment right to free exercise of religion. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). It has also been applied in cases involving regulations that restrict prisoners' access to reading materials. Thornburgh v. Abbott, 490 U.S. 401 (1989).

The magistrate noted that, while some Five Percenter literature may contain racist views, the defendants could point to no pieces of literature which advocated violence or illegal acts.[3]

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[3] In the memorandum accompanying their Motion for Summary Judgment, Defendants allude to one Five Percenter "lesson" which advocates the killing of four "devils," which Defendants interpret to mean white men. Defendants, however, have presented no actual piece of Five Percenter literature that overtly encourages the killing of whites,

The magistrate then concluded that the Five Percenters' literature could not be banned just because it contained racist views, especially where it has not been shown to advocate violence or illegal acts, or to be so racially inflammatory as to be reasonably likely to cause violence. Further, the magistrate opined that a "ready alternative" to a total ban on the literature would be to censor any materials that are inflammatory or promote violence, while allowing Plaintiffs to have access to other Five Percenter literature. Finally, he noted that, while concluding that the ban imposed by Defendants may be too restrictive, his report should not be construed as recommending that the Five Percenters' literature must be made available to inmates who are not Five Percenters and are not parties to this action.

In objecting to the magistrate's recommendation, Defendants argue that, while much of the Five Percenters' literature may not promote racial animosity or violence, the ban is nonetheless a reasonable and necessary measure to prevent the growth of the Five Percenter group, which has been deemed a security threat. Indeed, the magistrate agreed that the characterization of the Five Percenters as a security threat was reasonable and justifiable. However, this does not necessarily render the magistrate's recommendation incorrect.

The magistrate noted that the literature could be censored to remove any passages promoting violence or racial hostility, and that such a measure could provide a reasonable, "ready alternative" to an outright ban. More important, however, is the fact that it would create only a minimal impact on prison guards and the

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and the proper interpretation of this lesson is unclear under the current record. Needless to say, Plaintiffs dispute Defendants' interpretation of this lesson.

rest of the prison population, because the literature need not be made available to those who are not members of the Five Percenters group and who are not parties to this action. Defendants' concern that the availability of the literature within the general prison population might contribute to the growth of a security threat group is not an illegitimate one. Indeed, the Supreme Court has recognized that sometimes, literature may create the potential for discord by virtue of its very presence and circulation within a prison population, even if it does not directly advocate violence, and that prison officials should have discretion to address such threats. Thornburgh, 490 U.S. at 412-413. In this case, however, the magistrate's recommendation carefully indicated that Defendants would be required to make the literature available only to those inmates who are Five Percenters and who have been placed in isolation, and not to the general prison population. In short, the magistrate did not conclude that prison officials may not place any restrictions on the availability of Five Percenters literature -- in fact, his recommendation allows for a wide range of restrictions. The magistrate simply concluded that a total, outright ban was too restrictive -- a conclusion with which this Court does not find error.

Defendants also argue that the magistrate based his conclusion, at least in part, on legal authority that is no longer controlling. The magistrate cited the cases of Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976), and Long v. Puka, 390 F.2d 816 (3rd Cir. 1968), for the proposition that prisons may not ban literature simply because it adopts racist views. Defendants correctly note that both of these cases, which pre-date Turner and its progeny, apply standards that are more rigorous than Turner's "reasonableness" standard. However, two circumstances support the magistrate's ultimate conclusion in this case. First, although the Fourth Circuit has not yet spoken on the issue, several other circuits have

concluded in the years following Turner, O'Lone, and Thornburgh that literature may not be banned in prisons solely because it adopts racist views, so long as it does not promote or create a reasonable likelihood of violence. See Williams v. Brimeyer, 116 F.3d 351, 354 (8th Cir. 1997) (Acknowledging Turner as controlling authority and holding that literature may not be banned solely because it expresses racist and separatist views); Stefanow v. McFadden, 103 F.3d 1466, 1472-1473 (9th Cir. 1996) (Racist literature may be banned only if so inflammatory as to create threat of violence); McCabe v. Arave, 827 F.2d 634, 637-638 (9th Cir. 1987) (Recognizing Turner and O'Lone as controlling authority and holding that literature may not be banned just because it advocates racial purity).[4]

The second relevant circumstance is that the magistrate's recommendation, taken as a whole, was not based solely on Aikens and Long. Indeed, the vast bulk of his analysis of this issue concerns application of the Turner test, as required by O'Lone and Thornburgh. As such, the magistrate's recommendation cannot be said to be based on "bad law."

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[4] The magistrate cited McCabe as support for his recommendation. Defendants attempt to distinguish it on grounds that it did not deal with restrictions aimed at curbing the growth of a security threat group, and that it was decided before Thornburgh. The latter attempt to distinguish McCabe accomplishes nothing, because even though McCabe preceded Thornburgh, the Ninth Circuit correctly recognized Turner as controlling authority and applied its "reasonableness" test, as Thornburgh would have directed. Likewise, the former argument for distinguishing McCabe does not support Defendants' position. As stated supra, the magistrate clearly indicated that the Five Percenters' literature may be censored and need not be made available to the general prison population, a measure which would alleviate Defendants' concern about the group's growth.

Lastly, Defendants argue that some of the Five Percenters' publications contravene any conclusion that the group is an actual religion. However, Plaintiffs' status as a "religious" or "non-religious" group does not affect the applicable standard which governs this Court's examination of the literature ban. That standard is established by Turner, and under Thornburgh, restrictions on non-religious publications are to be evaluated under the Turner test as well. Therefore, even if the Five Percenters are not a religion, Turner still supplies the appropriate framework for evaluating a ban on their literature. As stated supra, the magistrate correctly applied the Turner test in concluding that a total, outright ban on Five Percenters' literature is too restrictive.

## IV. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

As stated in Section II, supra, of this Order, Plaintiffs originally filed a motion and brief seeking a preliminary injunction based on the Religious Freedom and Restoration Act (RFRA). After the RFRA was struck down by the United States Supreme Court, but before the magistrate issued his report and recommendation, Plaintiffs filed an amended brief containing an argument based on the First Amendment. Defendants filed a response in which the addressed both Plaintiffs' RFRA and First Amendment arguments. However, when he issued his report and recommendation, the magistrate did not address the First Amendment argument presented by Plaintiffs in their amended brief. Plaintiffs have objected to the magistrate's report and recommendation on the grounds that they are entitled to a preliminary injunction under their First Amendment argument.

Given the above resolution of Defendants' Motion for Summary Judgment, Plaintiffs' Motion for a Preliminary Injunc-

tion is mooted except as to Plaintiffs' claim that the total ban on inmate possession of Five Percenters literature violates the First Amendment. With respect to that single claim, this Court now considers the First Amendment argument advanced by Plaintiffs in their amended brief and in their objections to the magistrate's report and recommendation.

**A. Standard for Granting a Preliminary Injunction**

In the Fourth Circuit, four factors are relevant to determining whether a litigant is entitled to a preliminary injunction:

(1) The likelihood of irreparable harm to the plaintiff if the injunction is denied;

(2) The likelihood of harm to the defendant if the injunction is granted;

(3) The likelihood that the plaintiff will eventually succeed on the merits; and

(4) The public interest.

Blackwelder Furniture Co. v. Seilig Manufacturing Co., Inc., 550 F.2d 189, 192, 194-196 (4th Cir. 1977). The first two factors, which determine the "balance of hardships," represent the most important determination, as they dictate how strong a likelihood of eventual success on the merits a plaintiff must show. Hughes Network System, Inc. v. Interdigital Communications Corp., 17 F.3d 691, 693 (4th Cir. 1994) (citing Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991)). If the balance of hardships tips decidedly in the favor of the plaintiff, the injunction will be granted if the plaintiff "has raised questions going to the

merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 813 (4th Cir. 1991) (citing Rum Creek, 926 F.2d at 359). However, "as the balance tips away from the plaintiff, a stronger showing on the merits is required." Id. Moreover, the Fourth Circuit has cautioned that, before a preliminary injunction may be granted in any case, the party seeking it must show that it will suffer a type of harm that is irreparable. "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Hughes Network Systems, 17 F.3d at 694 (citing Sampson v. Murray, 415 U.S. 61, 90 (1974)).

**B. Discussion**

This Court's first task is to consider the degree to which the balance of hardships tips, if at all, in favor of Plaintiffs. The first step in such an analysis is to determine whether Plaintiffs stand to suffer irreparable harm if no injunction is granted. Plaintiffs have produced sufficient evidence to survive a motion for summary judgment regarding their claim that Defendants' total ban on Five Percenters literature violates their First Amendment rights. The Fourth Circuit has acknowledged that "a constitutional or federal statutory violation creates a special harm." Rum Creek, 926 F.3d at 361. Moreover, it has also noted that a deprivation of one's First Amendment rights, even for a short time, may constitute an irreparable injury. Id. at 362 n.12 (citing Elrod v. Burns, 427 U.S. 347 (1976)). Finally, since Defendants have been granted qualified immunity from money damages, Plaintiffs have no means of receiving compensation for any deprivations of their rights that may have occurred. Thus, there exists a substantial

likelihood that Plaintiffs will suffer an irreparable harm arising from an ongoing violation of their constitutional rights if no injunction is issued.

On the other side of the coin, the hardship to Defendants that would result from the issuance of a preliminary injunction is not great. As discussed in greater detail supra, Defendants would still be able to place significant restrictions on Five Percenters literature in SCDC facilities. Defendants would be allowed to censor the materials to remove any passages that may encourage violence or that would be so inflammatory as to pose a security threat. Moreover, as described in the magistrate's report and recommendation regarding Defendants' Motion for Summary Judgment, Defendants would not be required to allow the general prison population to have access to Five Percenters literature. Only those inmates who are Five Percenters and who are confined in segregated custody would be allowed access to the properly censored literature. The administrative burdens of making such an accommodation seem minimal, particularly when one considers that such an accommodation would not pose any of the security risks with which Defendants are concerned.

Given the fact that the balance of hardships appears to tip in Plaintiffs' favor, it is not necessary for them to show a strong likelihood of success on the merits -- instead, they only need to show that they have raised questions regarding the merits serious enough to make the issue "fair ground" for litigation. Rum Creek, 926 F.2d at 359. As described supra, Plaintiffs have raised enough factual and legal questions regarding the reasonableness of Defendants' ban on Five Percenters literature to survive a summary judgment motion. In doing so, they have shown that the issue is at least "fair ground" for litigation -- indeed, their argument that Defendants' ban is too restrictive appears persuasive. Thus, the

third Blackwelder factor weighs in Plaintiffs' favor as well.

The fourth and final factor concerns how the decision to grant or deny a preliminary injunction would impact the public interest. In this case, the interest at stake is presumably the public's interest in safe, efficient administration of its correctional facilities. As described above, the interests of prison safety and security would not be implicated by simply allowing those inmates who are Five Percenters and who are confined in segregated custody to have access to properly censored Five Percenters literature. Therefore, the fourth element of the Blackwelder test represents, at most, a neutral factor.

Taking all of the above factors into account, it appears that Plaintiffs are entitled to a preliminary injunction requiring Defendants to allow them to have access to properly censored Five Percenters literature.

## V. CONCLUSION

It is, therefore,

**ORDERED**, for the reasons articulated above, that Defendants' Motion for Summary Judgment is:

(1) **GRANTED** as to Plaintiffs' Eighth Amendment claim;

(2) **GRANTED** as to Plaintiffs' Equal Protection claim;

(3) **GRANTED** as to Plaintiffs' claim that placement of the Five Percenters in heightened-security segregated custody violates their First Amendment rights;

(4) **DENIED** as to Plaintiffs' claim that Defendants' total ban on inmate possession of Five Percenters literature violates their First Amendment rights; and

(5) **GRANTED** as to Defendants' claim that they are entitled to qualified immunity.

It is further,

**ORDERED**, for the reasons articulated above, that Plaintiffs' Motion for a Preliminary Injunction is **GRANTED** as to Plaintiffs' claim that Defendants' ban on Five Percenters' literature violates their First Amendment rights, and **DENIED** as to all other claims.

**AND IT IS SO ORDERED.**

s/ Patrick Michael Duffy
**PATRICK MICHAEL DUFFY**
**UNITED STATES DISTRICT JUDGE**

**Charleston, South Carolina**
**December 2, 1997**

Supreme Court, U.S.
FILED
AUG 18 1999
OFFICE OF THE CLERK

No. 99-131

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1998

ALEXANDER MICKLE, et al.

Petitioners,

v.

MICHAEL MOORE, et al.,

Respondents.

"IN RE: LONG TERM ADMINISTRATIVE SEGREGATION OF INMATES DESIGNATED AS FIVE PERCENTERS"

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

Approximately forty nine inmates confined in the South Carolina Department of Corrections (SCDC) filed individual lawsuits challenging their confinement in administrative segregation or "M" Custody on account of their membership in a group known as the Five Percenters. The Petitioners contend that their confinement is in contravention of the Free Exercise Clause of the First Amendment.[1]

The Five Percenters are an organization who have been identified by the Federal Bureau of Prisons as a "criminal group" that "operates behind a facade of cultural and religious rhetoric." Inmates belonging to the Five Percenters have been present within SCDC since at least 1992. Within SCDC, the Five Percenters have been a very assertive group of inmates who try to undermine prison authority and try to establish control over other inmates.

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[1] The Petitioners also raised Eighth Amendment and Fourteenth Amendment claims which were dismissed by the district court. The Fourth Circuit Court of Appeals affirmed that ruling. Those claims have not been raised in the Petitioners' Petition for Writ of Certiorari.

They are rebellious and resistant to authority, and they aggressively recruit new members.

On or about June 16, 1995, Michael Moore, then the Director of the South Carolina Department of Corrections, designated the Five Percenters a Security Threat Group (STG). His decision was based on their history of violence within SCDC and other prison systems around the country. There were a number of documented prison disturbances and other violent acts perpetrated by Five Percenters within SCDC.

The Security Threat Group policy for SCDC sets out a procedure for "validating" or confirming an individual inmate as a member of a STG, which includes giving the inmate a hearing. Any inmate validated as a member of a STG is transferred to administrative segregation, pending reclassification into a heightened custody level in accordance with procedures outlined in SCDC Policy 1200.5. Confinement in the heightened custody level allows prison officials to maintain closer supervision of those inmates and reduces the inmates' opportunity to organize and conduct criminal activity. Prison security has improved since the Five Percenters have been designated a Security Threat Group and those inmates reclassified to a higher custody level.

In this action, the Petitioners have challenged the action taken by SCDC to designate these inmates a threat group and to reclassify them to a higher custody level. The district court granted summary judgment to the Respondents, concluding that the reclassification of the Petitioners to a higher custody level did not unconstitutionally impinge on their right to free exercise of their religious beliefs. The Petitioners appealed to the Fourth Circuit Court of Appeals, which affirmed. A subsequent petition for rehearing *en banc* was denied.

## REASONS FOR DENYING THE PETITION

**I. The Fourth Circuit Court of Appeals was correct to apply the standard of review established in *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), in reviewing the constitutionality of the decision to reclassify Five Percenters to a higher custody level.**

The Petitioners contend that the Fourth Circuit erred in applying the standard of review established in *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), in reviewing the constitutionality of the decision to reclassify Five Percenters to a higher custody level. The Petitioners maintain that the court should have applied the strict scrutiny test set forth in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

The Fourth Circuit, however, was correct in applying the *Turner* and *O'Lone* standard given the prison context. *O'Lone* clearly teaches that where prison regulations are challenged, the same standard is applicable regardless of whether the challenge is mounted under the First Amendment or any other constitutional provision. In the prison context, the proper standard to be applied is as follows: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably

related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

Nonetheless, the Petitioners are procedurally barred from even raising this issue in this Court. In the district court, the Petitioners never argued that the *Turner* standard did not apply in this case. To the contrary, in their brief in opposition to the Respondents' motion for summary judgment, the Petitioners wrote: "Defendants' policy must be evaluated under the test enunciated in *Turner v. Safley* ..." Likewise, the Petitioners did not dispute or challenge the applicability of the *Turner* standard in the objections filed by the Petitioners to the magistrate judge's report and recommendation. Consequently, that issue was not properly preserved for appeal to either the Fourth Circuit or to this Court. *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.3d 841(4th Cir. 1985).

Furthermore, the Petitioners' reliance on this Court's decision in *Cooper v. Pate*, 378 U.S. 546 (1964), is misplaced. The Petitioners argue that the Fourth Circuit should have been guided by *Cooper* rather than by *Turner* and *O'Lone*. The Petitioners make it seem as if *Cooper* is directly on point. However, in *Cooper*, this Court did not even address the merits of

the inmate's claim. Instead, in a one paragraph opinion, this Court reversed the dismissal of the inmate's complaint and ruled merely that the complaint stated a cause of action. The *Cooper* Court did not reverse the prison administrators' decision to keep the inmate in segregation.[2]

The Petitioners further take exception to the Fourth Circuit's application of the *Turner* and *O'Lone* standard. The Petitioners argue that the Fourth Circuit's application of the standard conflicts with that of other circuits, but the Petitioners' discussion of this issue does not support that contention. The Petitioners can point to no single case which reflects that the Fourth Circuit failed to properly apply the *Turner* and *O'Lone* standard.

The Petitioners maintain that they were reclassified to a higher security level because of their religious beliefs. That is not true. The Petitioners were reclassified because of the demonstrated propensity for violence, disruption and other anti-

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[2] It is noteworthy that *Cooper* was decided before *Turner* and *O'Lone*. On remand in *Cooper*, the Seventh Circuit did not apply the *Turner* and *O'Lone* standard, and accordingly, *Cooper* is distinguishable on that additional point. *See*, *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967).

social behavior by members of the Five Percenter group. SCDC is not concerned with any religious beliefs; it is concerned solely with the security of its institutions, inmates and employees.

If an inmate renounces his affiliation with a threat group, then he may become eligible, depending on other factors, to return to the general population. The SCDC policy does not require any inmate to renounce any religious beliefs. If an inmate does not wish to renounce his affiliation with the group, that remains his prerogative, but in the interests of security, that inmate must remain in a higher custody level. At all times, the inmates are entitled to maintain their religious beliefs but they are prohibited from acting in a violent or dangerous manner.

The reclassification of threat group members is not an exaggerated response, as the Petitioners contend. There are no easy alternatives available. As the Fourth Circuit aptly recognized, SCDC is not required to put these inmates back in the general population until an additional act of violence occurs. The First Amendment does not prevent prison administrators from being proactive rather than reactive. Importantly, the reclassification of the Five Percenters was not a response to an isolated incident. The record of violence from 1992 forward by

Five Percenters constitutes compelling evidence to support the SCDC Director's decision to implement this policy.

## II. The Fourth Circuit Court of Appeals did not create a "prisoner exception" to Rule 56, FRCP.

The Petitioners erroneously contend that the Fourth Circuit has created a "prisoner exception" to Rule 56, FRCP. That was obviously not the intent nor the ultimate result of the Fourth Circuit's decision in this case.

Instead, the Fourth Circuit correctly explained that this Court has adopted a deferential standard of review for cases involving issues of prison administration. In *Turner v. Safley*, 482 U.S. 78 (1987), this Court held as follows:

> [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations." Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less

> restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration."

482 U.S. at 89. (Citations omitted). *See also, Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977).

In applying that deferential standard, the Fourth Circuit explained that judgments, opinions and even the understanding of a course of events that underlie a prison administrator's decision are always subject to attack or at least second-guessing. However, it is precisely that second-guessing in which the federal courts refuse to engage. *Turner* and other decisions clearly urge the lower courts to refrain from such conduct.

Consequently, the "command of judicial deference" does not mandate a "prisoner exception" to Rule 56, FRCP, as the Petitioners suggest. Instead, the deferential standard of review mandates that certain factual matters that may be in dispute are simply not material issues of dispute. It is not that the Fourth Circuit refused to draw certain inferences in the Petitioners' favor. Instead, under the *Turner* and *O'Lone* standard, the inferences that

the Petitioners sought to draw are simply not material to the proper application of the standard.

In sum, the Fourth Circuit correctly applied the *Turner* and *O'Lone* standard in this case. The court appropriately followed the holding in *O'Lone*, *supra*, where this Court writes:

> We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to "substitute our judgment on ... difficult and sensitive matters of institutional administration" for the determinations of those charged with the formidable task of running a prison.

*O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987). (Citation omitted). There is simply no issue raised in the Petitioner's Petition for Writ of Certiorari that warrants or even merits review by this Court.

## CONCLUSION

Based on the foregoing discussion and analysis, the Respondents respectfully request that this Court deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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No. 99-131

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

ALEXANDER MICKLE, et al.,
Petitioners,

v.

MICHAEL MOORE, et al.,
Respondents.

"IN RE: LONG TERM ADMINISTRATIVE SEGREGATION OF INMATES DESIGNATED AS FIVE PERCENTERS"

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## REPLY TO BRIEF IN OPPOSITION

Throughout its brief, the SCDC denies that petitioners have been placed in long-term segregation (or "reclassified to a higher security level," *Resp. Br.* at 8) because of their religious beliefs. Rather, it argues, petitioners are locked down because they are affiliated with the Five Percent Nation of Gods and Earths (or "the Five Percenter Group," *Resp. Br.* at 9). The SCDC "does not require any inmate to renounce any religious beliefs": an inmate retains the "prerogative" not to renounce his affiliation with the Five Percent Nation, but if he exercises that prerogative he must remain in segregation. *Resp. Br.* at 9.

The SCDC can make these inconsistent assertions only because it denies that the Five Percent Nation is a religion. It has maintained this position throughout this litigation. See App. at A-7, A-35. This position, however, is not tenable given the procedural posture of this case. Petitioners presented extensive evidence in the district court -- an expert declaration, religious texts, declarations from individuals describing their spiritual beliefs -- showing that the Five Percent Nation is a religion entitled to protection under the First Amendment. In analyzing the SCDC's motion for summary judgment, both the Fourth Circuit and district court below assumed this to be true. App. at A-7, A-20-21.

For most petitioners, their religious affiliation is the only explanation for their placement in segregation. The SCDC repeatedly refers to "violence, disruption and other antisocial behavior"; under its segregation policy, it writes, inmates "are prohibited from acting in a violent or dangerous manner." *Resp. Br.* at 8-9. But it is undisputed that most of the hundreds of inmates whom the SCDC has segregated since June 1995 pursuant to its policy have had *no* involvement in gang activity or other institutional violence or mis-

conduct. For example, lead plaintiff Alexander Mickle has been in segregation now for more than four years. Prior to his placement there, he was classified at a very low security level and had no record of disciplinary violations. The SCDC has not disputed petitioners' evidence showing that the institutional behavior of Mickle and such other petitioners as Shaleek Azeem, Walter Jenkins, and Ameed Stevenson has been excellent. There is simply no basis in the record for describing them as "violent and dangerous" prisoners.

The SCDC navigates this problem by arguing (*Resp. Br.* at 8-9) that it decided to segregate petitioners not because of their own conduct, but rather because of "behavior by members of the Five Percenter group." Petitioners submit that it is repugnant to the First Amendment and the principle of due process for government to punish innocent individuals based upon its impression of their religious group in general. Furthermore, the courts below refused to acknowledge the extent to which the SCDC's view of the Five Percent Nation as a "violent and dangerous" group is factually disputed. The SCDC maintains that the Five Percent Nation is a gang; petitioners presented evidence below that it is not. The SCDC maintains that the Five Percent Nation is racist; petitioners presented evidence below that it is not. The SCDC maintains that the Five Percent Nation encourages violent behavior; petitioners presented evidence below that Five Percent Nation discourages violence and other antisocial conduct, and that in fact the Five Percenter beliefs have influenced many adherents to behave peacefully in society and improve relationships with others.

This is the evidence that the Fourth Circuit expressly refused to consider, stating that "to draw these inferences in the inmates' favor would turn *Turner*'s command of judicial deference on its head." App. at A-10. The SCDC is wrong to assert (*Resp. Br.* at 11-12) that the evidence the Fourth Circuit disregarded was

"simply not material" to this case. Evidence about petitioners' religious beliefs and the nature of the Five Percent Nation generally is critical to any objective evaluation of the SCDC's policy under the First Amendment. No amount of "deference" or aversion to "second-guessing" (*Resp. Br.* at 11) can excuse the fundamental unfairness that has occurred in this litigation thus far: petitioners have been treated harshly for years based on the SCDC's assertions about the dangerousness of their religious group, and yet their evidence disproving these assertions has not been credited. A trial is necessary to resolve these factual disputes conclusively.

Respondents argue (*Resp. Br.* at 7) that petitioners are "procedurally barred" from seeking heightened scrutiny of the SCDC's segregation policy under the First Amendment. It is respondents, however, who are barred: they did not raise this argument in their brief to the Fourth Circuit below, a failure which amounts to waiver. See, e.g., Shopco Distrib. Co., Inc. v. Commanding Gen., 885 F.2d 167, 170 n.3 (4th Cir. 1989); Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 692 (4th Cir. 1978). The Fourth Circuit considered petitioners' arguments analogizing this case to Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), and others involving government policies targeting particular religious beliefs, but rejected the analogy on its merits: "restrictions that would clearly violate the Constitution outside the prison setting may be rationally based within that setting." App. at A-7 n.4. This case deserves review because even in the prison setting, "the principle that government may not enact laws that suppress religious belief or practice" may not be abrogated. See Church of Lukumi, 508 U.S. at 523.

Respondents suggest (*Resp. Br.* at 8 & n.2) that the ruling in Cooper v. Pate, 378 U.S. 546 (1964), is no longer good law after Turner v. Safley, 482 U.S. 78 (1987), and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). This Court, however, has continued

to cite Cooper with approval. See McCarthy v. Bronson, 500 U.S. 136, 141-42 (1991). The Seventh Circuit has stated that "O'Lone and Turner have served to clarify and amplify, rather than to depart from, the standard applied in [Cooper]." Hadi v. Horn, 830 F.2d 779, 784 n.6 (7th Cir. 1987); accord Sutton v. Stewart, 22 F. Supp.2d 1097, 1106 n.14 (D. Ariz. 1998), aff'd, ___ F.3d ___, No. 98-16680, 1999 WL 435837 (9th Cir. Jun. 16, 1999). Thus, the principle that courts must "closely scrutinize the reasonableness of any restriction imposed on a prisoner's activity in the exercise of his religion, and especially so where the adherents of one faith are more heavily restricted than adherents of another," Cooper, 382 F.2d at 521, is reflected in Turner's requirement that "prison regulations restricting inmates' First Amendment rights operate[] in a neutral fashion, without regard to the content of the expression," 482 U.S. at 90.

Respondents fail to explain (*Resp. Br.* at 7-8) how the holding in Cooper is not "directly on point" here. Both cases involved inmates who had been placed in segregation because of their religion. In Cooper, the inmate, a member of the Nation of Islam, had alleged this fact in a complaint. This Court reversed the lower courts' dismissal of the inmate's claim, stating that the First Amendment does not allow prison officials to discriminate against an inmate "solely because of his religious beliefs." 378 U.S. at 546. On remand, the Seventh Circuit held unconstitutional many of the challenged prison policies, but upheld the placement of the inmate in segregation because it was "for normal disciplinary reasons and not because of any religious beliefs he may hold." Cooper v. Pate, 382 F.2d 518, 523 (7th Cir. 1967).

Petitioners in this case do not seek an end to segregated confinement altogether, and certainly not as a means of discipline or preventing future disturbances. They do not suggest that the First Amendment prevents "prison administrators from being proac-

tive rather than reactive." See *Resp. Br.* at 9. But proactive prison management does not require the suppression of an entire religious group, especially where the evidence is disputed as to whether its members present any real threat to prison security at all. Under the SCDC's policy, petitioners have spent years in extremely restrictive segregation, not because of any evidence showing that they misbehaved in the past or are likely to do so in the future, but because of the religious beliefs they hold. This government policy is inimical to the First Amendment and warrants review by this Court.

## CONCLUSION

For the reasons set forth above and in their petition, this Court should grant petitioners a writ of certiorari.

Respectfully submitted,

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